Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

J. ELROY MCCAW and JOHN D. KEATING, *Petitioners*,

vs.

EARL W. FASE, the Tax Commissioner of the Territory of Hawaii, *Respondent*.

No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, J. ELROY MCCAW and JOHN D. KEATING, by their counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the Supreme Court of the Territory of Hawaii.

OPINIONS BELOW

The Supreme Court for the Territory of Hawaii wrote an opinion reported as *McCaw v. Fase*, 40 Haw. 97, 156. Appropriate portions of that opinion will be quoted throughout this Petition. The opinion of the Court of Appeals is reported in ..... F.(2d) ..... and is reproduced in Appendix B.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on October 30, 1954. An order staying the mandate of the Court of Appeals pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for a Writ of Certiorari, provided such petition was filed in the clerk's office of the Supreme Court of the United States on or before December 20, 1954, was entered on November 12, 1954. The jurisdiction of this court is invoked under Title 28 U.S.C.A. Sec. 1254 (1); and an appeal should be allowed on this case, instead of certiorari under Title 28 U.S.C.A., Sec. 1257(2) IF HAWAII IS ALLOWED THE STATUS OF A STATE, AS IT CLAIMS.

QUESTIONS PRESENTED

1. Is the "Business" and "Operation" of a radio station beyond the scope of territorial legislation?

2. Appellants' "operations" reach ships at sea, altogether outside the Hawaiian Territory's domain, but wholly within the license given by the Federal Communications Commission, so therefore, does not this "excise tax" or "gross receipts" tax on the "operations" of appellants' invade a subject matter which was preempted by the Communications Act of 1934?

3. Does not the Supreme Court of Hawaii's decision holding:

> "Upon such premise, we hold that *neither distance* at which emanations are receivable, *nor classification* for control and regulation, *but the sphere of actual commercial value,* is the criterion for determination of whether broadcasting is 'intra-

> state,' or 'interstate,' and accordingly is within or without the purview of the 'Commerce Clause' and the scope of exercised federal power thereunder otherwise than for control and regulation." (Italics ours)

conflict with the prescribed duties of the Federal Communications Commission who ruled in 1928:

> "While it is true that broadcasting stations in this country are for the most part supported or partially supported by advertisers, broadcasters are not given these great privileges by the United States Government for the *primary benefit* of advertisers. *Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public.*" (Emphasis in original)

4. Since the "benefit" derived by advertisers through the use of radio must be incidental and entirely secondary to the interest of the public, according to a ruling of the Federal Communications Commission, whose regulatory power can only exist by virtue of a legislative predicate on interstate commerce, does not the Supreme Court of Hawaii's decision that "the *sphere of actual commercial value* is the criterion for determination of whether broadcasting is 'intrastate' or 'interstate'" make the advertisers the primary beneficiaries of broadcasting, and the public interest secondary, in conflict with such ruling?

5. Does not the Supreme Court of Hawaii's opinion, erroneously affirmed by the Court of Appeals, hold in effect: That if there were a station in the Territory of Hawaii of sufficient power that the reception of its programs in another state or territory was sufficiently constant, so as to be of "commercial value" outside

the Territory of Hawaii, its "operations" would be tax-free while appellants would be subject to taxation? Therefore, is not the Hawaiian Law *a discriminatory tax?*

6. Should not this Court take judicial notice that stations, even of small wattage, located on or near state lines, will now be tax free, while stations of higher wattage located in the center of a state, will be taxed if this Court of Appeals decision is allowed to stand?

7. Who will be deciding hereafter, if the Hawaiian Supreme Court and the Court of Appeals decisions are upheld, whether a radio signal or a radio station's "operations" are "commercially constant" or of a "commercial value" outside of a given area? The various state courts, or the Federal Communications Commission, who under the law, must "classify stations" according to power and public need?

8. Does not this tax constitute a multiple burden upon interstate commerce?

9. As a matter of law, should not the tax have been held invalid since all the judicial tests for such a decision were fully met by the appellants' complaint, affidavits, exhibits, testimony, and practicality itself, demonstrated that the *ether* must be *owned* by the national government under which a licensee operates for a limited period, after waiving "any property right" in the *ether,* or to the "use" of a particular frequency?

10. The appellants and appellee stipulated, solemnly and in writing (see page 346 of Record before Court of Appeals, and Appendix A hereof) that all exhibits

and the Transcript of Evidence (three legible, bound copies of Testimony) "may be sent to the Court of Appeals as the Record on Appeal," therefore, was it not error for the Court of Appeals to state, "the appellants * * * have not brought up any of the evidence"? Especially, was this assertion not error since this stipulation was entered into pursuant to Rule 10 of the Court of Appeal's own Rules?

11. Is the Hawaiian judicial process where the prevailing lawyers write the opinions of the judges, due process?

12. Does not the decision of the Hawaiian Supreme Court and the Court of Appeals conflict with the prior rulings of this court and the duties of the Federal Communications Commission?

STATUTES AND RULES INVOLVED

The pertinent provisions of the Communications Act (Title 47 U.S.C.A. Sec. 151 to 609), particularly Sections 153, 301 and 303 of said Act; an excerpt from page 47, PUBLIC SERVICE RESPONSIBILITY OF BROADCASTING LICENSEES, a Ruling promulgated by the Federal Communications Commission, March 7, 1946; the Waiver to the use or property right in any particular frequency required by the Communications Act, and Rulings of the Federal Communications Commission to be signed by all applicants; the Hawaiian Laws involved, namely, Chap. 101, Sections 5455, 5535, 5219, 1575, Laws of Hawaii; and Rule 10(1) Rules of the U. S. Court of Appeals for the Ninth Circuit are set forth in Appendix A, *infra,* pages 1A to 7A.

STATEMENT OF THE CASE

Appellant J. Elroy McCaw is a citizen and resident of Centralia, Washington, and Appellant John D. Keating, a citizen and resident of Portland, Oregon. In 1946, they obtained a license for a limited term from the Federal Communications Commission to operate radio station KPOA in Honolulu, Territory of Hawaii, under the terms of the Communications Act of 1934, as amended (47 U.S.C., Sec. 151-609). The station, of 5000 watts power, commenced broadcasting on October 15, 1946, and is affiliated with the Mutual Broadcasting System.

It was also necessary under the law that appellants file and register with the International Telecommunication Union, Geneva, Switzerland, a specialized agency of the United Nations, its frequency, the allocated power of the station, and the names of the licensed operators, namely, the appellants (Exhibits "B" and "D").

The appellants initiated an action in the United States District Court for the Territory of Hawaii for relief against the enforcement of Chap. 101, Sec. 5455 which is an "excise" or "Gross Receipts" tax on the business and "operation" of a radio broadcasting station, contending that their remedies, if any, were inadequate and had expired in territorial courts. Such action was dismissed without prejudice and is now a companion case to this Petition for a Writ of Certiorari before this Court at this term.

Appellants were coerced, by the inaction of the United States District Court, into filing this suit on May 3,

1951, in the Circuit Court, First Judicial Circuit, Territory of Hawaii, under Sec. 1575 of the Laws of Hawaii, to recover a sum of $7,637.33 which was paid to the Tax Commissioner under protest. This suit was filed by agreement with the appellee in order to insure more than a sum of $5,000.00 being involved, which is the jurisdictional amount needed to appeal from the Supreme Court of Hawaii to the United States Court of Appeals for the Ninth District under Sec. 1293, Title 28 U.S.C.

Appellants filed a complaint (Tr. 3-23) setting forth their allegations as to the unconstitutionality of the tax law, and alleged that *all* broadcasting was interstate commerce; that Congress had preempted the subject matter of radio broadcasting to the exclusion of any legislative concern of a Territory by the enactment of Title 47, U.S.C. Sections 151-609. Appellants' other remedies under the Hawaiian laws had expired by the time this suit was filed. Appellants had no defense whatsoever against this alleged illegal tax law, except the defense of unconstitutionality. Appellants could not question at this time, since their time for appeal had expired, the "right" or "wrong" of any assessment. What was "interstate" or "intrastate" revenue or receipts was decided solely, finally, and entirely by the Tax Commissioner and was not subject to any review.

Upon appellants' filing of this suit for the return of $7,637.33, including penalties (that portion of the suit asking the return of penalties is really a farce for "penalties" can never be recovered under the Hawaiian Laws, as appellants will set out hereinafter) the appel-

lee promptly filed a counterclaim for the additional sum of $14,595.98. The Territorial "snare" or "trap" was thus succesfully closed and the appellants were nicely "caught," as appellants had unsuccessfully attempted to convince the United States District Court in the companion case to this, would happen.

The trial judge rendered an oral "decision" (?) from the bench in favor of appellee but the writen decision of the Judge was then written, "barefaced" and without apology, by counsel for the appellee. And, that is the "decision" which has been successfully sustained by appellee.

The findings "brought forth" by the local territorial court, or more accurately, "by appellee's counsel," and sustained by the Hawaiian Supreme Court, appear on page 3 of the Court of Appeals' decision (see Appendix B) and all of them monotonously refer and pertain only to the "sphere" or "extent" of appellants' "commercial coverage."

In Findings 1, 2, 3, 4, 8 and 9, the only ones considered by the Court of Appeals, were those "Findings" which sustained the Hawaiian Supreme Court's ultimate opinion that "*neither distance* at which emanations are receivable, *nor classification* for control and regulation, *but the sphere of actual commercial value,* is the criterion for determination of whether broadcasting is 'intrastate' or 'interstate.' "

The territorial Circuit Court, as aforesaid, "ruled" in favor of appellee. An appeal was taken to the Supreme Court of Hawaii who rendered an opinion (*McCaw v. Fase,* 10 Haw. 121), holding:

> "Upon such premise, we hold that *neither distance* at which emanations are receivable, *nor classification* for control and regulation, *but the sphere of actual commercial value,* is the criterion for determination of whether broadcasting is 'intrastate,' or 'interstate,' and accordingly is within or without the purview of the 'Commerce Clause' and the scope of exercised federal power thereunder otherwise than for control and regulation."

Attention was called to the Court of Appeals that this Hawaiian decision, and now, the decision of the Court of Appeals, is really a "classification of a radio station" and in direct conflict with the prescribed duties of the Federal Communications Commission, who are the only agency charged by Federal law "to classify radio stations" (See Sec. 303, Title 47, U.S.C.) and courts and states, especially Territories, cannot do so.

The Federal Communications Commission had issued a Ruling that "broadcasters are not given these great privileges by the United States Government for the *primary benefit of advertisers.* Such benefit as it is derived by advertisers must be incidental and entirely secondary to the *interest of the public*" (See Public Service Responsibility of Broadcast Licensees, 1946, p. 14).

It was called to the attention of the lower courts, again and again, that the foregoing principle which was promulgated as a "Basic Ruling" for radio as early as 1928 was now reversed and the *advertiser* placed in the *primary* position, and the listening public is now in a *secondary* place, just for the sake of sustaining the doubtful "pride of opinion" in an excessive sovereign's right to tax.

In preparing the appeal from the Supreme Court of Hawaii, appellants and appellee solemnly entered into a stipulation pursuant to Rule 10 of the Rules of the Court of Appeals (former Rule 11, now Rule 10, at the time this case was appealed permitted such stipulations) and all the exhibits in the case before the Supreme Court of Hawaii were taken up as part of the Record of Appeal to the Court of Appeals in this case (see Stipulation, Appendix A).

Scant attention was paid by the trial court, the Hawaiian Supreme Court, or by the Court of Appeals to the rights of the listener. No listener who is on a ship at sea, or those in Alaska, Samoa, and the Mainland who have the right to receive appellants' broadcast, can ever be considered again as "listeners" of appellants, since this unique "classification" of a radio station, without a "short wave" broadcast being set up especially for them, as the court's findings deemed necessary, but the courts forgot that the listener may not have a short wave set. This was pure legal fiction for the "listeners" will continue to "listen," and will continue to write to appellants, as set out later herein.

The Communications Act did not give Territories the right "to classify stations," either as to "listeners" or as to their "commercial sphere," and this point was repeatedly called to the attention of the lower courts.

Evidence was introduced showing appellants sold time in Samoa (see Plaintiff's Exhibits R1 and R2). Boxes of letters, hundreds and hundreds of letters, from listeners from as far west as Australia; north to Alaska; as far east as New York, and from every state

in the Union were introduced into evidence (Exhibit R1). Yet, the lower courts, following an Arkansas case (*Beard v. Vinsonhaler, post*), blindly and unswervingly, "classified" these listeners as a sort of a radio "nut," or "D-X'ers," as they were derisively termed. Plaintiffs introduced evidence from Exhibits "A" to "V," which exhibits are now before this court pursuant to an order entered by the Chief Judge of the Court of Appeals, sending up all the original Exhibits and papers to this Court.

Appellants' evidence includes charts prepared according to an International Agreement showing the world allocation of frequencies in the radio spectrum from 10,000 cycles to 10,500,000 cycles and the portion allocated to the United States. Appellants' evidence showed that all radio signals, more than 3 degrees above the ground, became "skywaves" and traveled off into space and were incapable of being confined within a national boundary. The lower court conceded that a radio signal of small wattage will travel around the world. The evidence of appellants showed what happens to a signal when it goes into the "E" layer or into the "F" layer of space, but all of this evidence was shrugged off—politely, of course.

A map of the world showing how the world had been divided into three regional divisions, with the United States and Hawaii being allocated unto Region II, of the world allocation of radio frequencies, was placed in evidence.

The evidence included also, the applications appellants had to file for a radio license with the Federal

Communications Commission, and the applications for a renewal thereof at stated intervals, all showing positively that the right of a licensee of a frequency, or to the use of the ether was not a private right.

Evidence was introduced showing the extent and sensitivity of the control over operators of radio stations by the Federal Communications Commission, including their "financial," "character" and "technical" qualifications.

The Public Service Responsibility of Broadcasting, a report issued by the Federal Communications Commission on March 7, 1946, commonly called the "Blue Book," was introduced into evidence, showing that appellants had only a 70% of its potential radio time to sell and 30% of its time had to be used for public service endeavors without compensation.

Evidence was also introduced showing that this tax was really a tax upon "operations" and that the "economic aspects" of radio included "financial aspects" which had already been pre-empted by the Congress to the exclusion of any concern of a Territory.

Notwithstanding apellants' allegations to the effect that the Communications Act did not create new private rights, and that the ether was owned by the public as opposed to a mere sovereign regulation, the territorial court and the Court of Appeals proceeded to "classify radio stations" in conflict with Sec. 303 (a), Title 47 U.S.C.

It was also called to the attention of the territorial Courts and Court of Appeals that this Hawaiian tax law was identical with the tax law struck down by this

Court in the *Fisher's Blend* case, *Fisher's Blend Stations, Inc. v. State Tax Commission,* 297 U.S. 650, 58 S.Ct. 608, the Court stating at p. 610:

> " * * * The essential purposes and indispensible effect of ALL broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. *See Federal Radio Commission v. Nelson Bond & Mortgage Co.,* 289 U.S. 266, 279, 53 S.Ct. 627, 77 L.ed. 1166." (Emphasis ours.)

Appellee and the lower courts seemed to think that because the facts were "stipulated" in the *Fisher's Blend* case, that made it a case of limited application although the *Western Live Stock* case (*post*) extended its meaning. For that matter, the *Pacific Telephone* case, upon which the Appellee and the lower Courts relied, came up on a mere demurrer to this Court, and was decided prior to the *Fisher's Blend* case, at the same Term, and cited in the *Fisher's Blend* case. Both cases involved a Washington State Tax law which is identical to the one at Bar, and this Court held it good as to a Telephone Company and illegal as to Radio.

Just prior to the *Fisher's Blend* ruling, a three-judge Court at Tacoma, Washington, in *K.V.L. v. Wash. Tax Com.,* in 12 F.Supp. 49, held on a case, *NOT stipulated,* as to Facts, that the same tax law was illegal.

The present case was argued before the Court of

Appeals who rendered their decision on October 30, 1954 (see Opinion of Court of Appeals, Appendix B). Appellants again call the attention of this Court to a companion case to this one at bar for which Certiorari is also sought simultaneously herewith, to review the judgment of the Court of Appeals in dismissing an appeal from the United States District Court for Hawaii.

Appellants respectfully incorporate herein, with this Court's permission, by reference, all of the assertions in that Petition, as if set forth fully herein.

REASONS FOR GRANTING THE WRIT

1. In *Fisher's Blend Stations Inc. v. State Tax Commission*, 297 U.S. 650, 58 S.Ct. 608, the Court stated on page 610:

> "* * * The essential purposes and indispensible effect of ALL broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. See *Federal Radio Commission v. Nelson Bond & Mortgage Co.*, 289 U.S. 266, 279, 53 S.Ct. 627, 77 L.Ed. 1166." (Emphasis ours.)

It is noted that the Supreme Court says in the *Fisher's Blend* case, speaking through Mr. Justice Stone in 1936, that "ALL" broadcasting was interstate commerce. The court did not say "a 5,000-watt station"; the court said "*all broadcasting.*" Nor did the Supreme

Court say anything about State Courts being the determinative agents "of the sphere of commercial value of such broadcasting," as the Hawaiian Supreme Court held. Nor, do appellants adopt the view of the Supreme Court of Hawaii or the Court of Appeals that Mr. Justice Stone was referring to "characteristics" of broadcasting, in the latter part of his opinion, as modifying the earlier part where the Supreme Court ruled that "all" broadcasting was interstate commerce. The *Fisher's Blend* case was reaffirmed and *augmented in Western Live Stock v. Bureau of Revenue* (1938) 303 U.S. 250, 58 S.Ct. 546, 82 L.ed. 823, which paradoxically enough is a case relied upon by the appellee. Mr. Justice Stone rendered the opinion of the court also in the *Western Live Stock* case on February 28, 1938, and the case was argued on the theory of "multiple burden" taxation. This case involved a suit by a magazine in New Mexico to prevent a gross receipts tax from being assessed on its distribution of magazines and the magazine publisher (appellant) relied upon the *Fisher's Blend* case. On page 551, in discussing the *Fisher's Blend* case as applied to the *Western Live Stock* case, Mr. Justice Stone, the same judge who rendered the opinion in the *Fisher's Blend* case, speaking for the court, stated:

> " * * * In this and other ways the case differs from *Fisher's Blend Station, Inc. v. State Tax Comm'n., supra,* on which appellants rely. There the exaction was a privilege tax laid upon the *occupation of broadcasting,* which the court held was *itself* interstate communication, comparable to that carried on by the telegraph and the telephone, and was measured by the gross receipts derived from

that commerce. *If broadcasting could be taxed, so also could reception. Station WBT, Inc. v. Poulnot,* D.C., 46 F.(2d) 671." (Emphasis ours.)

"Great Britain levies an annual license tax on radio receiving apparatus.

" * * * In that event a cumulative tax burden would be imposed on interstate communication such as might ensue if gross receipts from interstate transportation could be taxed."

Thus the Supreme Court augmented its prior holding and brought the *Fisher's Blend* case into the "multiple burden" rule, a defense for appellant in this case. There is a noticeable absence of this later statement by Justice Stone in the State Court rulings relied on by appellees (Arkansas and New Mexico decisions, *post*). We repeat what the court said: "*if broadcasting could be taxed, so also could reception.*"

The fact that reception is not taxed does not make the tax as to broadcasting valid. Each is essential to the other. The *mere possibility* that reception could be so taxed is sufficient to render the Hawaiian law on broadcasting invalid under the "multiple burden" rule. At this time, we call attention to the fact that Mr. Justice Stone did NOT cite the *Fisher's Blend* case in the *Western Live Stock* case as a case *of limited application,* or as one confined to a "*stipulated set of facts,*" as does appellee and the Court of Appeals.

As far as "stipulating" the facts are concerned in the *Fisher's Blend* case (*supra*), the *Pacific Telephone* case (*supra*) relied on by appellee, was also decided by this Court upon a mere demurrer to the complaint. (See original Briefs, *Pacific Telephone v. City of Seattle,* No. 364, Supreme Court)

Just *before* the Supreme Court ruled in the *Fisher's Blend* case, on a "5000 Watt Station's " complaint (same as appellants' power), a three-judge statutory court, sitting at Tacoma, ruled the same statute (struck down in *Fisher's Blend* case) was invalid as to a 250 Watt Station, and *the Fisher's Blend case cited this case,* namely, *KVL v. State Tax Commission,* 12 F. Supp. 49.

Hence, the "laboring" of the point that the *Fisher's Blend* case was on a stipulated set of facts, is dispelled not only by its augmentation in the *Western Live Stock* case (*supra*) and the foregoing indisputable facts.

The Supreme Court has held many times that the question of whether a field has been pre-empted by the Congress to the exclusion of any concern by the states, turns upon the *sensitivity* of the field so pre-empted. The complaint, appellants' exhibits, and all the evidence clearly showed that there is no commerce as sensitive in the modern world as radio. The *ether must* be *owned* by the public. It is incapable of being owned privately.

The license granted to appellants (Exhibit "E") expressly excludes the licensee from claiming *any property right* in the use of any particular frequency "or of the ether."

For a history of radio broadcasting before the Supreme Court see *National Broadcasting Company v. Federal Communications Commission,* 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344, which held that the Federal Communications Commission was more than a "mere policing organization."

The case of *Dumont Lab. v. Carroll,* 84 F.Supp. 813 (Penna., D.C.) (Aff'md. Cir. Ct. of App., Penna.) 184 F.(2d) 153 (Cert. to this court denied) in striking down censorship of television films by the State of Pennsylvania, held:

> "I am satisfied that in the field of television there has been a plenary exercised by Congress of the power to regulate and a complete occupation of the field, including censorship. Under the comprehensive scheme of regulation established by the Communications Act, the Commission can exercise effective control over the content of programs, and the fact that this scheme eliminates one particular method of control, namely, censorship in advance of showing, in favor of a less drastic one does not mean that that field is left untouched."

Congress pre-empted the "financial" aspects of a radio station's existence by affirmatively writing the word "financial" in the statute. The Federal control on the subject was so complete that even had Congress not used the word "financial," the mere silence of Congress on the subject would have amounted to a prohibition of a state to have considered the "economic" or "financial" aspects of a radio station. Congress affirmatively used the word "financial" and the Federal Communications Commission concerns itself with the "economic" and "financial" aspects of a station, under the Act of Congress. The Commission will only let a station earn 70% of its potential. All other businesses can earn 100%. But not radio. It must *give* 30% of its time to the public interest without charge probably "in lieu of taxes." That can be the only meaning to this hard and fast rule of the Communications Commission.

Therefore radio has only 70% of its earning potential left. The Territory seeks to whittle that down. Congress was ahead of the Territory, however, and pre-empted the "financial" aspects of radio. State taxes affect the "economic" and "financial" aspects of a station; therefore a state must give way to a superior Federal control on the subject matter.

The Federal Communications Commission in March, 1946, issued its "Blue Book" (Exhibit G) wherein the Federal Communications Commission declared its jurisdiction over the "Economic Aspects" of a broadcast licensee. "Economic Aspects" include "financial" (Act of Congress includes the word "financial") aspects (See Complaint).

The Supreme Court held in 1940 that "financial qualifications to operate a proposed station" was an important element of "public interest requirements." See *F.C.C. v. Sanders Bros.*, 309 U.S. 470, 60 S.Ct. 693, 84 L.ed. 869. Also, "economic injury," in *Colorado Radio v. F.C.C.* (1941) 118 F.(2d) 24, to a radio broadcasting station licensee was held relevant on the issue of public interest as to whether a license should be granted. To the same effect, see *Heitmeyer v. F.C.C.* (1938) 95 F.2d) 91; *Stuart v. F.C.C.* (1939) 105 F.(2d) 788. See *Saginaw Broadcasting v. F.C.C.* (1938) 96 F. (2d) 554 (Cert. denied, 59 S.Ct. 72) where it was held to be a duty of the F.C.C. to make a finding of adequate financial support as a basis of granting a license. Thus, it is clear that the subject of "finances" has been assumed by the Commission, to the exclusion of a state, especially a Territory of archaic and feudal tendencies

where the "winning" lawyers write the "decisions" of its courts, if one can call them judicial "decisions."

However, in spite of the foregoing assumption of control by the Federal Communications Commission of the "Economic Aspects" of radio licenses; and, in spite of laws and decisions of the Federal Courts (*supra* and *post*), the States of Arkansas and New Mexico in *Beard v. Vinsonhaler* (1949) 221 S.W.(2d) 3, and *Albuquerque Broadcasting Co. v. Revenue* (1950) 215 P.(2d) 819, decided flat license fees were valid. Attempt was made in New Mexico to appeal to a Three-Judge Federal Court, but the Federal Court, while holding radio was interstate commerce, was thwarted by complainants prior action in submitting to state jurisdiction and the Johnson Act (Section 1341, 28 U.S.C.A.) was held to prohibit that court from granting relief. (Contrary—*Cromwell* case, 66 S.Ct. 445)

Mere denials by the Supreme Court of appeals from these decisions are now considered by the Court of Appeals as having overruled the *Fisher's Blend,* the *KVL, NBC,* and *Western Live Stock* cases (*supra* and *post*), which assumption is contrary to a recent decision of this Court in *Railway Express Agency v. Virginia,* 347 U.S. 359, 174 S.Ct. 558.

If the Court has doubt that a uniform national system of control over radio, precluding any state taxes whatsoever on the subject matter, was not the intention of Congress, then such a declaration should be made forthrightly. If the "Government does NOT "own" the *ether* above its domain, who does? No tax should ever be allowed to be collected under the guise

of innuendo, indirection, confusion, or misinterpretation. Such lead to legal indignity. These "economic aspects" must be cleared up (See *Dumont v. Carroll,* 184 F.(2d) 153). For, if the states can tax at all, the present tax of two and one-half per cent can be raised to ten per cent and thus will be accomplished the second "breakdown" in communications, which Congress intended should never happen in 1934.

2. All local sales, "services," "activities" and "instrumentalities" of appellant exist solely for the single purpose of projecting its final act—its signal—into space. Without this *final* act, all prior acts and activities of appellant would be useless. Conversely, without the *prior acts* (*i.e.,* sales, services, instrumentalities, etc.), the final act—the projection of appellant's signal into space—could not be accomplished. Thus, as defined by the Communications Act, appellant's activities are all inextricably interstate, regardless of an incidence or so of local activity. All activities of appellants are inseparable from its purpose for existence—namely, to broadcast.

Radio broadcasting consists of *three* indispensible elements, namely, (1) *the transmitter,* (2) the connecting medium, or *the ether,* and (3) *a receiving set.* A loss of any one of the three and you have nothing. Each is indispensible to the other. Thus *the transmitter* (1) is so essentially a part of (2) the connecting medium or *the ether* and (3) *the receiving set,* that you could not have broadcasting without reception or the connecting medium, the ether. All local activities, such as sales, programming, etc., are defined in Section 153, Title 47,

U.S.C.A., as "*instrumentalities, facilities, and services incidental to such transmission.*"

Application of cases dealing with taxes upon express companies, railroads, sleeping cars, telegraph companies or the production of electric power are inapplicable to the case at Bar.

This tax is not really a tax upon the "business" of broadcasting. It is a tax upon its "operations" and "services incidental to such transmission." There is a distinction between the two for Congress has preempted the subject matter of a station's "operations," and "services incidental to such transmission" even though the "business" is "private." Also, the F.C.C. says the "business" of a radio station can *only* earn 70% of its potential (*supra*).

There is a substantial federal question involved in *this* petition. In *Beard v. Vinsonhaler,* 338 U.S. 863, where an appeal was dismissed, there was a *license tax* of only a few dollars involved. Obviously, there was no substantial federal question. In this case at Bar there are substantial federal questions, *i.e.,* (1) a tax on "operations" and "services incidental to such transmission" and not just a business tax, (2) a conflict, whereby the territorial courts state that it and other state courts now have the right to determine as to which radio station is engaged in interstate commerce or is not, depending upon the extent to which its signal is "commercially receivable," as opposed to the duty of the F.C.C. to "classify stations" by law.

If appellants are not in interstate commerce, as measured by the intensity of its signal, then it follows that the F.C.C. should not concern itself with appel-

lants' business. The Hawaiian Supreme Court held in this case that the Territories and States will determine as to which radio station *is or is not* in interstate commerce. The Court stated:

> "Upon such premise, we hold that neither distance at which emanations are receivable, nor classification for control and regulation, but the sphere of actual commercial value, is the criterion for determination of whether broadcasting is 'intrastate,' or 'interstate,' and accordingly is within or without the purview of the 'Commerce Clause' and the scope of exercised federal power thereunder otherwise than for control and regulation."

In *National Broadcasting Co. v. United States* (*supra*), the Supreme Court took a different view:

> " * * * The Commission's licensing function cannot be discharged, therefore, merely by finding that there *are no technological objections to the granting of a license.* If the criterion of 'public interest' were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? * * *
>
> " * * * The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all of the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers *to promote* and *realize* the vast potentialities of radio. * * *
>
> " * * * These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more

effective use of radio in the public interest.' We cannot find in the Act any such restriction of the Commission's authority. * * *

" * * * In the contex of the developing problems to which it was directed, the Act gave the Commission not niggardly but *expansive* powers. It was given *a comprehensive mandate* to 'encourage the larger and more effective use of radio in the public interest,' if need be, by making 'special regulations applicable to radio stations engaged in chain broadcasting.' " (Italics ours)

The Supreme Court of Hawaii, has in effect found now that state legislatures and state courts should ignore the distance at which emanations are "receivable" and "classification (by the F.C.C.) for control and regulation," and should establish their own "criterion for determining of whether broadcasting is 'intrastate' or 'interstate'." The "advice" of the Supreme Court of the United States in the *National Broadcasting* case (*supra*) can now be dispensed with according to this decision. The Hawaiian Supreme Court has now held that the States (and Territories with the "winning" lawyers writing the decisions, of course) will handle the technological as well as the other criteria which Congress thought it endowed the F.C.C. to do and of which the Supreme Court of the United States spoke in the *National Broadcasting* case (*supra*).

A few words of the late Mr. Justice Jackson are apropos. In the case of *Northwest Airlines v. Minnesota,* 322 U.S. 292, 64 S.Ct. 950, 88 L.ed. 1283, wherein he concurred with the majority in confining a state tax on personal property of an airline to that state (Later overruled, and turning on the question of "regulation"

as opposed to "ownership" of the air), the late Mr. Justice Jackson said:

> "Congress has recognized the National responsibility for regulating air commerce. Federal control is intensive and exclusive. *Planes do not wander about in the sky like vagrant clouds.*" (Italics ours)

Nor are radio signals aimlessly propagated, no matter the wattage. The intensity of the Federal control, and the sensitivity thereof, should now be clarified because of the conflicting opinions of these lower courts.

3. The decision of the Hawaiian Supreme Court and the Court of Appeals decision, to the effect that states may now decide which station is or is not in interstate commerce, depending on its "sphere of actual commercial value" is tantamount to a "classification" of a radio station, and in conflict with the following Act:

Title 47, U.S.C.A. Section 303:

> " 'Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> " '(a) *Classify* radio stations;
>
> " '(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;
>
> * * *
>
> " '(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this act * * * ;
>
> " '(g) Study new uses for radio, provide for experimental uses of frequencies, and generally en-

courage the larger and more effective use of radio in the public interest;

* * *

" '(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

* * *

" '(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * * ." (Italics ours)

4. The lower court decisions placing the "commercial sphere" or frankly, the "advertiser" foremost and ahead of the "listening public," conflicts with a basic Ruling of the Federal Communications Commission (1928) and reported on page 14, Public Service Responsibility of Broadcast Licensees, March 7, *1946,* as follows:

> "While it is true that broadcasting stations in this country are for the most part supported or partially supported by advertisers, broadcasters are not given these great privileges by the United States Government for the *primary benefit* of advertisers. *Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public.*" (Emphasis in original.)

The Federal Communications Commission is not just interested in "policing" or "regulation" as the governmental agency regulating airlines.

> *"The Communications Act did not create new private rights."* (Italics ours)
>
> *Scripps Howard v. F.C.C.,* 316 U.S. 4, 62 S.Ct. 875, 86 L.ed. 1229.

"A licensed broadcasting station must operate in the public interest and is a *trustee* for the public." (Italics ours)

McIntire v. Penna. Broadcasting, 151 F.(2d) 597.

5. The Hawaiian tax law is a discriminatory one and in violation of the United States Constitution. Discrimination practiced against citizens, whether as to race, or on a mundane matter of taxes, or no matter how practiced, is odious.

A 50,000 watt station in the United States or in Honolulu, under the philosophy of the lower courts' decisions, are now free of any taxation. No *advertiser* would *dare* testify that he wanted *only* a local audience. Thus, stations are to be 'classified" by "persons" and their "testimony" instead of by law.

On page 5 of the Court of Appeal's decision, the court cites the case of *McGoldrick v. Burwind-White Co.,* 309 U.S. 33, as upholding a state tax on net income wholly derived from interstate commerce. The Court of Appeals emphasizes and underlines the following phrase in said decision, "*non-discriminatory* taxation of the instrumentalities of interstate commerce is prohibited."

The mere possibility of the existence of discrimination is sufficient to declare this law invalid, as in the prohibition against "multiple burden" taxation. The mere possibility that "multiple burden" taxation exists is sufficient to hold a tax invalid (See *Joseph v. Carter and Weekes,* 330 U.S. 422, 67 S.Ct. 815, 91 L.ed. 993 (1947)).

6. The *ether* is unlike the airways, where the owners of land may be held to have some rights to the air over which airplanes fly. (See recent case of *Braniff Airways v. Nebraska,* 347 U.S. 590, 74 S.Ct. 757, where this Court said the C.A.A.'s regulatory powers were *not* bottomed on *ownership* of the air.) However, this indispensable element of broadcasting, namely, the "ether," has to be *owned* exclusively by the Sovereigns. It has to be. World conferences are held, to which the United States and all nations are signatories, to allocate radio frequencies among themselves to avoid international confusion. Radio waves know no frontiers. The *ether,* or space in which radio signals travel, is incapable of private ownership. However, no such international conferences or agreements are needed for airplanes. The appellants' frequency *must* be filed in Switzerland. That is *not* true of Braniff Airways.

The lower trial court stated in its brief oral decision before Counsel for Appellee "wrote and polished it up":

> "And, of course, on the mainland, where state boundaries are very close, it is impossible to say in many instances that it (radio) is not interstate commerce. Examples have been referred to, such as a radio station in Spokane or Coeur d'Alene, a radio station in El Paso, near the Mexican border, a radio station at Yuma, between California and the Arizona border, and you could make any number of such examples."

7. The Court of Appeals' decision on page 3, Appendix "B", setting forth the Findings from 1 to 11, inclusive, is replete with the phrases "commercial

coverage" and "time buyers," but there is an appalling and a noticeable lack of such phrases as "public interest," and the words, "convenience" and "necessity." Nor is there any mention of the philosophy or reasoning behind Sec. 301, Title 47 U.S.C.A., which states as follows:

Title 47, U.S.C.A. Sec. 301:

"Section 301. *License for radio communication or transmission of energy.*

"It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, *but not the ownership thereof, by persons* for limited period of time, under licenses granted by Federal authority, and no such license shall be construed to create *any right,* beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) *from one place in any Territory* or possession of the United States or in the District of Columbia *to another place in the same Territory,* possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) *from any place in any State, Territory, or possession of the United States,* or in the District of Columbia, to any place in any foreign country or *to any vessel;* or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to

any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State: or (e) upon any vessel or aicraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter. (June 19, 1934, c. 652, Sec. 301, 48 Stat. 1081.)" (Italics ours.)

8. The Supreme Court augmented and brought the *Fisher's Blend* case (*supra*) into the "multiple burden" rule. There is a noticeable absence of this part of this case's entire philosophy in the decision of the Court of Appeals and the State Court rulings relied on by appellee (Arkansas and New Mexico decisions—*supra*).

We repeat what the Supreme Court said "*if broadcasting could be taxed, so also could reception*" (*Western Live Stock* case, *supra*). This was *not* a limited statement confined to stipulated facts. The fact that reception is not taxed, however, does not make the tax on broadcasting valid. The *mere possibility* that reception could be taxed is sufficient to render the Hawaiian law on broadcasting invalid under the "multiple burden" rule. For, without one, you could not have the other.

In the case of *Joseph v. Carter and Weekes*, 330 U.S. 422, 67 S.Ct. 815, 91 L.ed. 993 (1947), a gross receipts tax was declared invalid although the possibility of

"multiple burden" taxation did not in fact exist. The tax in the *Carter-Weekes* case arose out of a local excise tax law of the City of New York imposing a two per cent excise tax on the business of stevedoring; that is, loading and unloading of ships, in a New York harbor. The City of New York contended the taxable activity, as the appellee in the case at bar contends the activity of radio, was a local activity of loading and unloading of ships, and the taxable event was so completely disjointed from the actual commerce as to characterize it as an intra-state activity. That is exactly the position the appellee in the case at bar takes with relation to broadcasting. Appellee states that broadcasting in Hawaii is purely an intra-territorial activity and that reception is a mere incident thereto, whether far or near and depending on "the commercial value," not the intensity of the signal, the criteria under which a station is licensed by the F.C.C. This contention is made despite the fact Hawaii is encompassed by the Act (see *post* and *supra*); and not withstanding, every taxicab, or small boat that has a transmitter must obtain a F.C.C. license to use and operate such.

The Supreme Court of the United States (1947) disagreed with New York City and held that the activity of stevedoring was so essentially a part of the commerce itself that the tax was illegal.

In other words, the court reasoned that "if a ship is loaded, it must be unloaded," so to speak. This Court did not say that the "commercial value" (whether loading or unloading scrap steel or diamonds) was the "criteria" for determining whether the activity was

intra-state or *interstate* commerce, as did the Hawaiian Supreme Court. Broadcasting is akin to "shiploading" —if "intelligence is broadcast, it has to be received," somewhere—far or near, regardless of its value. The court stated:

> " * * * Stevedoring, we conclude, is essentially a part of the commerce itself and, therefore, a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by these gross receipts, is invalid. We reaffirm the rule of Puget Sound Stevedoring Company. 'What makes the tax invalid is the fact that there is interference by a state with the freedom of interstate commerce.' *Freeman v. Hewit, supra*, 329 U.S. 249, 256, 67 S.Ct. 274, 279. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effect of state legislation and its actual or probable consequences. Not only does it follow a line of precedence outlawing taxes on the commerce itself but it has reason to support it in the likelihood that such legislation will flourish more luxuriantly where the most revenue will come from foreign or interstate commerce. Thus, in port cities or transportation or handling centers, without discrimination against outstate as compared with local business, larger proportions of necessary revenue could be obtained from the flow of commerce. The avoidance of such a local toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause."

9. The case at Bar should have been decided as a matter of law, in favor of appellants. The evidence and exhibits showing the radio spectrum of the world, as allocated by the World Conference, with sufficient other exhibits were attached to the complaint. There were no facts capable of dispute in this case as is indicated by even a glance at the pleadings. That is—until appellee saw a chance to create fictional "facts," by hoping for a limited interpretation by this Court of the *Fisher's Blend* case (*supra*) through seizing on the vague point that the "facts" in that case were "stipulated," and ignoring its broader interpretation in the *Western Live Stock* case (*supra*). Should the Supreme Court of the United States sustain a territorial court in "classifying" radio stations, such a ruling will cause untold confusion and will be in conflict with Sec. 301 (a), Title 47, U.S.C.A.

National Broadcasting Company v. Federal Communications Commission (*supra*) (the "chain broadcasting decision") a case of monumental proportions, was decided on a motion for summary judgment. This case at Bar could have been disposed of as a matter of law. There were no real disputed facts. The "facts" belatedly conjured by appellee were brought forth only to attempt to distinguish the *Fisher's Blend* case. In the *Western Live Stock* case (*supra*), where the *Fisher's Blend* case was reaffirmed, with new vigor, nothing was said about "stipulated facts" limiting its application.

The complaint filed by appellants was extensive and fully supported by affidavits (See Complaint, Tr. 3 to 30). Appellants' license from the Federal Communi-

cations Commission is one for a limited period of time. The conditions precedent to such a grant were set forth in the complaint (Tr. 3 to 23) and such conditions precedent are so many and varied (including *financial, technical* and *character* qualifications), and the regulations of the Federal Communications Commission are so *sensitive,* that the complaint alleged that states and territories could not concern themselves in any way whatsoever with legislation in the field of radio communication, or, with any part of its operations (Tr. 3 to 23).

10. Both parties stipulated (See Stipulation in Appendix "A") that all the exhibits and the Transcript of Testimony should be brought up from the Hawaiian Supreme Court pursuant to Rule 11, Court of Appeals' Rules for the Ninth Circuit, at the time this appeal was made. At the argument before the Court of Appeals it was brought out and demonstrated to the court that three bound, legible copies of the Transcript of Testimony before the trial court were there before the Court of Appeals, together with all the exhibits and evidence.

Just how the Court of Appeals can say, as they did, on page 4, "While the appellants have challenged the findings in many respects, they *have not brought up any of the evidence.*"—is beyond your Petitioners' comprehension. It was there, but was not used.

11.(a) This court has often held that fair play is the essence of "due process" under the United States Constitution. In fact, that statement appeared in the recent case of *Galvan v. Press,* 347 U.S. 522, 74 S.Ct. 737.

There is nothing "fair" about the "prevailing lawyer" writing the decision of a judge. It is offensive to all those inheritors of the Magna Charta. It is a practice as silly and absurd today, and as needless, as the mediaeval system of trial by combat. No glibness of tongue, oratory, or *any excuses* can justify one of the advocates having *anything* to do with writing a trial judge's opinion. Appellee's counsel did not just submit proposed Findings of Fact and Conclusions of Law. Appellee's counsel *wrote* the decision of the judge and appellee's counsel did it "bare faced" and without any apology.

As this court has stated, "due process is of the essence of fair play." There is nothing "fair" about this kind of practice. It is nefarious, utterly and intellectually indigestible, and is not "due process."

11.(b) There is no provision for *returning* penalties under this tax law in the territorial statutes. Likewise, there is no statutory provision for paying the *tax without the penalties being added thereto.* In fact, the penalty by Hawaiian law, becomes an Hawaiian "realization." The Treasurer of the Territory, if penalties are paid in advance of suit, and as they must be under these fondly described "remedies" by appellee, is prohibited by Secs. 5535 and 5219, Hawaiian Laws, from *repayment* or *refunding.* True, Sec. 1575 of Hawaiian Laws provides that a payment may be made to a "public accountant," not *a court,* but actually to *the Territorial Collector,* and thus to the Territory itself. That is the way it was paid in the case at Bar. But, the *later* Secs. 5535 and 5219 govern the *repayment*

of such taxes if the taxpayer wins and one can only recover the 'income" and not the penalties, and such are not remedies at all but are legal "snares."

The Hawaiian Treasurer has no right to return the penalties for such become part of the "income" and therefore, if a taxpayer wins, and payment was made under Sec. 1575 Revised Laws of Hawaii, the same "shall become a realization," as set forth in the laws themselves, and the taxpayers' triumph becomes a Pyrrhic victory.

Sec. 5535, Laws of Hawaii, expressly provides:

> "No taxpayer shall be exempt *from delinquent penalties* by reason of having made an appeal on his assessment, but the tax paid, covered by an appeal duly taken, shall be held in a special deposit and distributed as provided in Section 5219, for which purpose the word *'valuation' shall be deemed to refer to the amount of income."* (Emphasis ours)

Sec. 5219, Laws of Hawaii, expressly provides:

> "The tax paid upon the amount of any assessment, actually in dispute and in excess of that admitted by the taxpayer, and covered by an appeal duly taken, shall, during the pendency of the appeal, *be held by the treasurer in a special deposit* to await the final determination of the appeal. If the final determination *is in whole* or in part *in favor* of the appealing taxpayer, the treasurer shall *repay to him out of such deposit the amount of the tax paid upon the valuation* [*"Income" only,* not the "penalties," as *"valuation"* is described in Sec. 5535 above] *held by the court to have been excessive or non-taxable. The balance,* if any, or the whole of the deposit, in case the decision is wholly

in favor of the assessor, *shall, upon the final determination, become a "realization" under the tax law concerned."* (Emphasis and note ours)

The "trick" in the above sections is that a "valuation" is described in Sec. 5535 as "income" but when it comes to "refunding" under Sec. 5219, the penalties (now in excess of $25,000.00 in this case) have become a "realization under the tax law concerned." So, win or lose, the Territory cannot help but make some money, so to speak, by merely becoming litigious. These statutes do not provide remedies. They are "a snare," and totally lacking of "due process."

12. The duties of the Federal Communications Commission have been well prescribed by the Congress (Title 47 U.S.C.A., Sec. 151-609). The Commission is authorized to make rules and this court has been very "touchy," with the everlasting gratitude of the American public, about seeing that this great modern phenomena, radio, should not be abused either by private persons or by excessive sovereigns. This court has held that licensees are only the "trustees" for the public. This court has held that no new "private" rights were created by the Communications Act of 1934. The lower courts' decisions proceeded to "classify" radio stations in violation of Sec. 303, Title 47 U.S.C. A territorial court now states that its "classification" of a radio station, namely that "the sphere of actual commercial value is the criterion for determination of whether broadcasting is 'intrastate' or 'interstate'," shall prevail over the prescribed duties of the Federal Communications Commission and the Laws of Congress.

Sec. 301, Title 47 U.S.C.A., specifically states that the transmission of energy from (a) "one place in any Territory—to another place in the same Territory" shall be within the control of the Federal Communications Commission. This statute likewise had no effect upon the lower courts.

CONCLUSION

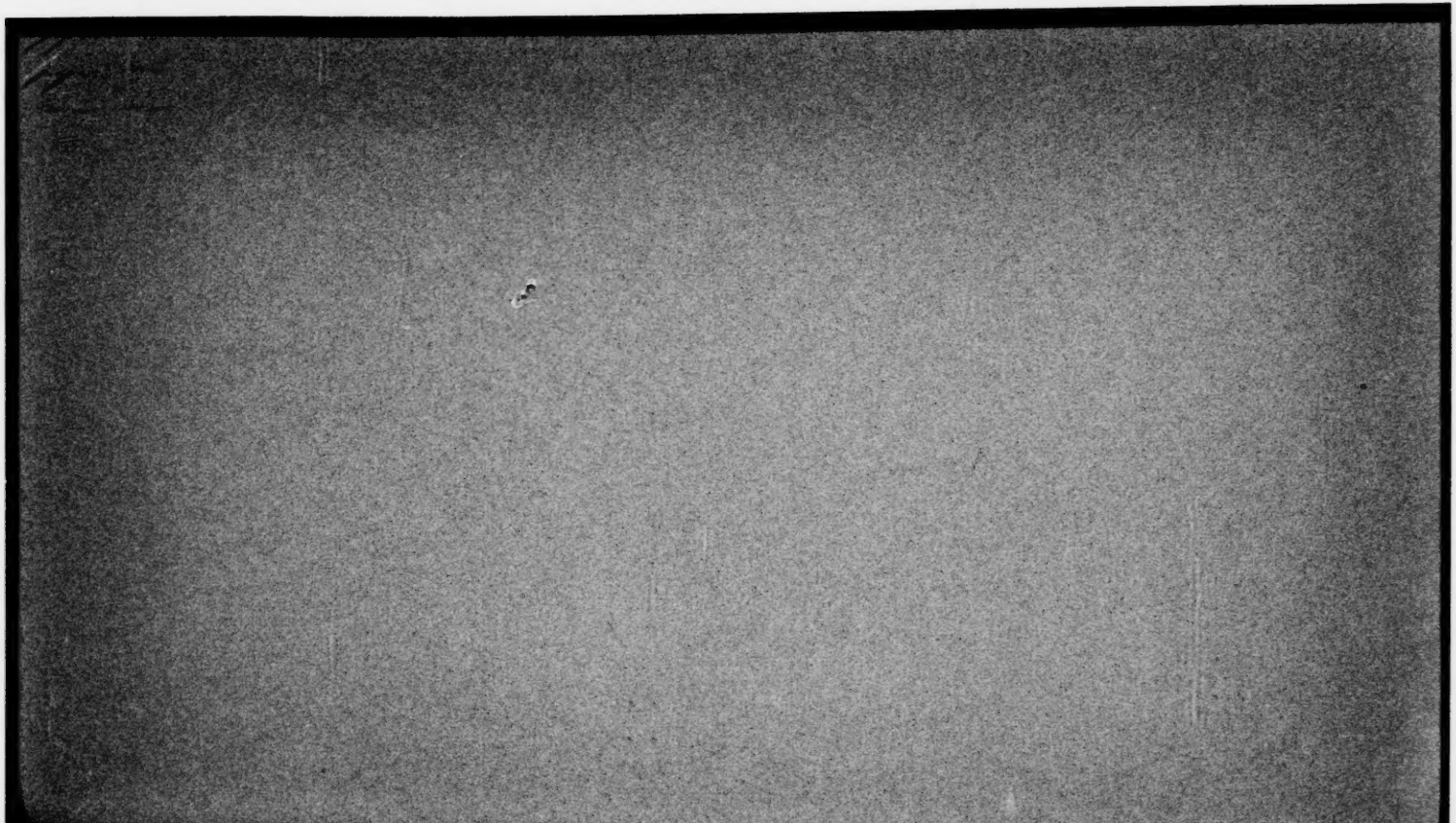
For the foregoing reasons it is respectfully submitted that this Petition for Certiorari should be granted. The case presents issues which are important in the future administration of the Federal Communications Act, to the states, and to the radio industry, and the case is of pressing importance to future governmental rights and duties over the public "properties" in the ether. Last, but of as great importance, is the lack of "due process" in Hawaii, where the "prevailing lawyers" write the judicial opinions, and where tax laws are "snares." A searching inquiry should be made by this Court into these practices.

Respectfully submitted,

KENNETH DAVIS
Attorney for Petitioners.

DAVID INGMAN
Of Counsel.

APPENDICES



APPENDIX A

STATUTORY PROVISIONS, RULES, RULINGS OF THE FEDERAL COMMUNICATIONS COMMISSION AND STIPULATION OF PARTIES

Statutory Provisions

Title 47, U.S.C.A., Sec. 153, Subsection B:

"Section 153. Definitions.

"For the purposes of this chapter, unless the context otherwise requires—

"(a) 'Wire communication' or 'communication by wire' means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalies, facilities, apparatus, *and services* (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

"(b) 'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all *instrumentalities, facilities,* apparatus, *and services* (among other things, the receipt, forwarding, and delivery of communications) *incidental* to such transmission.

"(d) 'Transmission of energy by radio' or '*radio transmission of energy*' includes both such transmission and all instrumentalities, facilities, *and services incidental* to such transmission.

"(k) 'Radio station' or 'station' means a station equipped to engage in radio communication or *radio transmission of energy.*" (Italics ours)

Title 47, U.S.C.A. Sec. 301:

"Section 301. *License for radio communication or transmission of energy.*

"It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, *but not the ownership thereof, by persons* for limited period of time, under licenses granted by Federal authority, and no such license shall be construed to create *any right,* beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) *from one place in any Territory* or possession of the United States or in the District of Columbia *to another place in the same Territory,* possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) *from any place in any State, Territory, or possession of the United States,* or in the District of Columbia, to any place in any foreign country or *to any vessel;* or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the

jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter. (June 19, 1934, c. 652, Sec. 301, 48 Stat. 1081.)" (Italics ours.)

Title 47, U.S.C.A. Section 303:

" 'Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

" '(a) Classify radio stations;

" '(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

* * *

" '(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this act * * * ;

" '(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * *

" '(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

* * *

" '(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. * * * "

Public Service Responsibility of Broadcasting Licensee, Reported by Federal Communications Commission, March 7, 1946

"IV. Economic Aspects—The problem of program

service is intimately related to economic factors. A prosperous broadcasting industry is obviously in a position to render a better program service to the public than an industry which must pinch and scrape to make ends meet. Since the revenues of American Broadcasting come primarily from advertisers, the terms and conditions of program service must not be such as to block the flow of advertising revenues into broadcasting. Finally, the public benefits when the economic foundations of broadcasting are sufficiently firm to insure a flow of new capital into the industry, especially at present when the development of FM and television is imminent."

Rule 10, Rules of the United States Court of Appeals for the Ninth Circuit

"Appeals, Return and Record

"1. In all cases on appeal or review, civil or criminal, the clerk of the trial court or commission shall transmit to the clerk of this court the original files designated by the respective parties as the record on appeal or review."

Stipulation

"No. 2898

"In the Supreme Court of the Territory of Hawaii

J. Elroy McCaw and John D. Keating,
Complainants, Plaintiffs-in-Error,

vs.

The Tax Commissioner of the Territory of Hawaii, Earl W. Fase, *Defendant-in-Error.*

Error to the Circuit Court, First Judicial Circuit, Honorable Willson C. Moore, Fourth Judge, Presiding

Law No. 21340

"STIPULATION

"IT IS HEREBY STIPULATED by and between the parties hereto that the original papers in the Supreme Court of the Territory of Hawaii, including all exhibits and the transcript of evidence, may be sent to the United States Court of Appeals for the Ninth Circuit as the record on appeal in said Court pursuant to the Federal Rules of Civil Procedure, the rules of the United States Court of Appeals for the Ninth Circuit and the rules of the Supreme Court of the Territory of Hawaii; PROVIDED, HOWEVER, that certified copies of the Bond on writ of error and the Bond on Appeal to the United States Court of Appeals for the Ninth Circuit be substituted for the originals.

Dated at Honolulu, Hawaii, this 8th day of June, 1953.

J. ELROY MCCAW and JOHN D. KEATING,
Complainants, Plaintiffs-in-Error,

By DAVID N. INGMAN and KENNETH DAVIS,
Their Attorneys,

By DAVID N. INGMAN

THE TAX COMMISSIONER OF THE TERRITORY OF HAWAII, EARL W. FASE,
Defendant, Defendant-in-Error,

By /s/ RHODA V. LEWIS,
RHODA V. LEWIS,
Deputy Attorney General,
Territory of Hawaii.

"SO ORDERED:
EDWARD A. TOWSE,
Chief Justice

{SEAL SUPREME COURT TERRITORY OF HAWAII}

Section 7 (Application for a Radio Broadcasting License):

"Applicant waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of

the previous use of the same, whether by license or otherwise, and requests a station license in accordance with this application."

HAWAIIAN LAWS INVOLVED

"Sec. 5455, Hawaiian Laws, Imposition of Tax. There is hereby levied and shall be assessed and collected annually privilege taxes against the persons on account of their business and other activities in this Territory measured by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as follows:

* * *

"D. Tax upon theaters, amusements, radio broadcasting stations, etc. Upon every person engaging or continuing within this Territory in the business of operating a theater, opera house, moving picture show, vaudeville, amusement park, dance hall, skating rink, radio broadcasting station or any other place at which amusements are offered to the public, the tax shall be equal to two and one-half per cent of the gross income of the business."

Section 5535, Laws of Hawaii:

"No taxpayer shall be exempt from delinquent *penalties* by reason of having made an *appeal on* his assessment, but the tax paid, covered by an appeal duly taken, shall be held in a special deposit and distributed as provided in Section 5219, for which purpose the word '*valuation' shall be deemed to refer to the amount of income.*" (Law 1945) (Italics ours)

Section 5219, Laws of Hawaii:

"The tax paid upon the amount of any assessment, actually in dispute and in excess of that ad-

mitted by the taxpayer, and covered by an appeal duly taken, shall, during the pendency of the appeal, be held by the treasurer in a special deposit to await the final determination of the appeal. If the final determination is in whole or in part in favor of the appealing taxpayer, the treasurer shall repay to him out of such deposit the amount of the tax paid upon the *valuation* held by the court to have been *excessive or non-taxable. The balance,* if any, or the whole of the deposit, in case the decision is wholly in favor of the assessor, *shall, upon the final determination, become a realization under the tax law concerned.*" (Italics ours)

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. ELROY MCCAW and JOHN D. KEATING, *Appellants*,
vs.
EARL W. FASE, The Tax Commissioner of the Territory of Hawaii, *Appellee*.

No. 13,920
Oct. 30, 1954

Appeal from the Supreme Court of the Territory of Hawaii.

Before: DENMAN and ORR, Circuit Judges
YANKWICH, District Judge

YANKWICH, District Judge:

Appellant J. Elroy McCaw is a citizen and resident of Centralia, Washington, and appellant John D. Keating a citizen and resident of Portland, Oregon. In 1946, they obtained a license for a limited term from the Federal Communications Commission to operate a radio station known as KPOA in Honolulu, Territory of Hawaii, under the terms of the Communications Act of 1934, as amended (47 U.S.C., §151-609). The station, a 5000 kilowatt station, commenced broadcasting on October 15, 1946.

On May 3, 1951, the appellants filed in Law in the Circuit Court, First Judicial Circuit, Territory of Hawaii, an amended complaint in a suit brought under Section 1575 of the Revised Laws of Hawaii, 1945, to recover the sum of $7,637.33 paid under protest on March 21, 1951. It is conceded that the suit was begun within the period of thirty days after the protested payment, as required by Section 1575.

The amended complaint alleged that the taxes paid

under protest were assessed under Chapter 101 of the Revised Law of Hawaii, 1945, upon the gross receipts from radio broadcasting by station KPOA, Honolulu, owned and operated by the appellants, which it challenged as unconstitutional and invalid.

The appellants are a co-partnership registered as such under the laws of the Territory of Hawaii and doing business under the name of "Island Broadcasting Company."

On June 11, 1946, the partnership obtained a license under Section 5451 of Chapter 101 of the Revised Laws of Hawaii, 1945, known as the "general excise tax" or "gross income" tax law, and for the period beginning October 1, 1946, and ending November 30, 1947, the partnership returned for taxation its broadcasting income, and paid the tax on it. For December, 1947, and thereafter, while continuing to report income from broadcasting, the partnership claimed exemption of all such income upon the ground that it was derived from interstate commerce.

It is the appellants' contention in this litigation that *all* broadcasting is interstate commerce, that Congress had preempted the subject matter of radio broadcasting to the exclusion of state and territorial legislation of every kind, including taxation, and that the assessments made by the Tax Commissioner were unconstitutional and invalid. The Tax Commissioner, in his answer, asserted in substance that the gross receipts assessed for taxation were derived from the transmission of KPOA broadcasts to the radio audience in the Territory of Hawaii, that KPOA does not reach an audience outside the Territory of Hawaii with effective and satisfactory service that is of commercial value in the sale of radio time, that sponsors purchasing radio time on KPOA do not do so with a view of reaching an audience outside the Territory of Hawaii, that where sponsors

have occasion to reach an audience outside the Territory, a short-wave relay is employed, and that the Tax Commissioner excluded from the tax assessments all the receipts from the programs transmitted by short-wave relay. In a counterclaim, the additional sum of $14,595.98, in accrued taxes with interest was sought.

The cause was tried without a jury. Findings were entered on January 28, 1952, the court making twelve specific findings, of which the following are the most important:

"1. Insofar as places outside the Territory of Hawaii are concerned, KPOA's broadcasts on its standard band do not afford effective or satisfactory service that measures up to the standards for commercial coverage.

"2. Time buyers do not buy time on KPOA as a medium of communication to an out-of-the-territory audience.

"3. Where a KPOA broadcast is directed to an out-of-the-territory audience a short wave relay is used, as in the case of the program 'Hawaii Calls.'

"4. The tax has not been assessed on any receipts from broadcasts carried out of the Territory by short wave relay or brought into the Territory by short wave relay.

"8. A large number of KPOA time buyers have no desire or occasion to reach any audience outside the Territory, even if effective and satisfactory service were offered.

"9. The radio audience outside the Territory of Hawaii is not a factor in the selling or buying of radio time on station KPOA, where no short wave relay is employed.

"11. The territorial tax law has been and is properly interpreted and applied by the Tax Com-

missioner and the tax law and assessments made thereunder are valid."

On the basis of these findings the Court concluded that the plaintiff was not entitled to recover the taxes paid and gave judgment to the Tax Commissioner on his counter-claim.

Torkel Westley, who was the Tax Commissioner before the case arose, was replaced in office by Earl W. Fase. On writ of error to the Supreme Court of the Territory of Hawaii, the judgment was affirmed in *McCaw v. Fase,* 40 Haw. 121, the Court holding that the findings are sustained by the evidence and that the tax did not have any of the constitutional infirmities urged by the appellants. The Supreme Court held that the trial court had found

> "from the evidence—as we do, likewise—that assessment of the Territory's gross income tax involved was restricted to receipts of KPOA from the latter's local business, to-wit, that which had commercial value only within and not without the Territory of Hawaii." (*McCaw v. Fase, supra,* at p. 172)

The Supreme Court also concurred in the finding of the trial court that the radio broadcasting, by KPOA on its standard wave, was

> "for other than control and regulation, such as had commercial significance and value only within the Territory of Hawaii, or 'intrastate'." (p. 172)

This is a direct appeal from the decision. (28 U.S.C., §1293)

While the appellants have challenged the findings in many respects, they have not brought up any of the evidence. In the circumstances, the presumption of correctness of the findings under Rule 52(a) of the Federal Rules of Civil Procedure, applies with great

strictness. *Richard v. Thompson,* 9 Cir., 1934, 72 F(2) 807, 809; *United States v. Van Dusen,* 8 Cir., 1935, 78 F(2) 121, 122; *Gallagher's Steakhouse v. Bowles,* 2 Cir., 1944, 142 F(2) 530, 531. However, in reality, the appellants are contending that it appears from the pleadings themselves that the tax to which they are subjected is a burden on interstate commerce and not within the power of the Territory of Hawaii to exact. The statute involved is one imposing a tax upon sales, services and, in general, all types of business in the Territory measured by gross receipts. The portion material to this cause reads:

> "§5455. Imposition of Tax. There is hereby levied and shall be assessed and collected annually privilege taxes against the persons on account of their business and other activities in this Territory measured by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as follows:
>
> * * *
>
> "D. Tax upon theaters, amusements, radio, broadcasting stations, etc. Upon every person engaging or continuing within this Territory in the business of operating a theater, opera house, moving picture show, vaudeville, amusement park, dance hall, skating rink, radio broadcasting station or any other place at which amusements are offered to the public, the tax shall be equal to two and one-half per cent of the gross income of the business." (Revised Laws of Hawaii, 1945, Chapt. 101, §5455)

It cannot be disputed that the legislature of Hawaii may levy an excise tax. *Brodhead v. Borthwick,* 9 Cir., 1949, 174 F(2) 21. The question to determine is whether the tax burdens interstate commerce. The control of the Congress over interstate commerce is absolute. *U.S. Constitution,* Art. 1, §8, Cl. 3. So any direct inter-

ference with it by any State must give way. The Supreme Court has summed up the primacy of this power in the sentence:

> "This power over commerce when it exists is complete and perfect." *United States v. Rock Royal Coop., Inc.*, 1939, 307 U.S. 533, 569.

But the same Court has stated that

> " * * * It was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, Western Live Stock v. Bureau, 303 U.S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce. *Nondiscriminatory taxation of the instrumentalities of interstate commerce is not prohibited.* The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use, or withdrawal for use, by the consignee after the interstate journey has ended is not precluded." *McGoldrick v. Berwind-White Co.*, 1940, 309 U.S. 33, 45 (Emphasis added)

So it is evident that there is a wide area in which the state may exercise its taxing power. And this includes even instrumentalities of interstate commerce. This has been an accepted principle since *Cooley v. Howard,*

1851, 12 How. 298 was decided. Ever since, state taxes on instrumentalities of interstate commerce have been sustained. We consider some illustrative cases showing the variety of tax statutes upheld over the course of years.

Statutes taxing the property of express companies. *Pacific Company v. Seibert,* 1892, 142 U.S. 339; *Postal Telegraph Cable Co. v. Charleston,* 1894, 153 U.S. 692; *Osborne v. Florida,* 1897, 164 U.S. 650; *Adams Express Co. v. Ohio,* 1897, 165 U.S. 194; *Williams v. City of Talladega,* 1912, 226 U.S. 404; *Wells Fargo & Co. v. Nevada,* 1918, 248 U.S. 154.

Statutes taxing the property or the receipts from the operations of the property of a railroad. *New York Central Railroad v. Miller,* 1906, 202 U.S. 584; *St. Louis & East St. Louis Electric Ry. Co. v. Hagerman,* 1921, 256, U.S. 314; *Southern Ry. Co. v. Watts,* 1923, 260 U.S. 519; *Western Maryland Railway Co. v. Rogan,* 1951, 340 U.S. 520.

A tax on sleeping cars. *Pullman Company v. Adams,* 1903, 189 U.S. 420.

A tax on sale and production of electric power. *Broad River Power Co. v. Query,* 1933, 288 U.S. 178.

Similarly, the courts have sustained consistently taxes upon property destined for interstate commerce either before it leaves the State or after it reaches it. Illustrative is *Heisler v. Thompson Colliery Co.,* 1922, 260 U.S. 245, in which Pennsylvania subjected every ton of anthracite coal mined "washed, screened, or otherwise prepared for market" in the State to a one and one-half per cent tax of its value when prepared for market to be assessed after it is prepared as indicated and is "ready for shipment or market." (*Penn. Laws,* 1921, page 479, 72 P.S. Pa. §2501) And more recently, courts have sustained a tax on local adver-

tising levied on publishers of newspapers and magazines, *Western Live Stock v. Bureau of Revenue,* 1938, 303 U.S. 250, and have permitted the application of a personal property tax on the entire fleet of airplanes of an airplane company, despite the fact that the planes, while home-based in the State, were in and out of the State during the year, none of them being continuously without the State during the whole tax year. *Northwest Air Lines, Inc. v. Minnesota,* 1944, 322 U.S. 292. Various state "use-taxing" statutes have been upheld. *Henneford v. Silas Mason Co.,* 1937, 200 U.S. 577; *Felt & Tarrant Mfg. Co. v. Gallagher,* 1939, 306 U.S. 62; *Southern Pacific Co. v. Gallagher,* 1939, 306 U.S. 169; *Pacific Telephone & Telegraph Co. v. Gallagher,* 1939, 306 U.S. 182; *Alabama v. Key & Boozer,* 1941, 314 U.S. 1; *Curry v. United States,* 1941, 314 U.S. 14. And see, *California v. Thompson,* 1951, 313 U.S. 109 (regulating solicitation of business for interstate carriers); *Brown v. Parker,* 1943, 317 U.S. 341 (Conceding to the states tax power to regulate local agricultural products destined for interstate commerce before they reach such commerce). And even where the same instrumentalities are used in inter and intrastate commerce, a tax on the local business based upon the gross income has been sustained. *Pacific Telephone & Telegraph Co. v. Tax Commissioner,* 1936, 297 U.S. 403. There, as here, there was no proof offered that the tax did, in fact, burden interstate commerce. *McCaw v. Fase,* 40 Haw. 97, 156. Reliance was on the fact that the intra and interstate business were so interwoven that the tax on gross receipts against telegraph companies and railroads admittedly engaged in interstate commerce was, of necessity, a burden on interstate commerce. The court rejected the contention in an opinion written by Mr. Justice Brandeis, in which, speaking for the unanimous court, he wrote:

"Taxes for the privilege of doing local business measured by the gross income of such business have frequently been laid upon concerns engaged in both intrastate and interstate business; and have, for half a century, been sustained without enquiry whether withdrawal from the local business would compel discontinuance of the interstate. That an occupation tax upon a foreign telegraph company measured by earnings from its local business is valid, was indicated as early as Telegraph Co. v. Texas, 105 U.S. 460, 464-465; and was definitely held in Ratterman v. Western Union Telegraph Co., 127 U.S. 411, which has been repeatedly cited with approval in cases involving interstate railroads and telegraph companies. Similarly, in Southern Ry. Co. v. Watts, 260 U.S. 519, 529-530, a so-called franchise tax for the privilege of doing intrastate business, measured by a percentage of the value of property subject also to an *ad valorem* tax, was sustained as against both foreign and domestic railroads.

"*No decision of this Court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable.*" (page 415) (Emphasis added)

This case has decisive significance because it was decided at the same term as the decision on which the appellants rely chiefly, *Fisher's Blend Stations, Inc. v. State Tax Commission,* 1936, 297 U.S. 650. That decision was upon a demurrer to the complaint. The parties stipulated that the case might be submitted upon the facts recited in the complaint. The complaint showed that the State of Washington had imposed a tax on the gross receipts derived from broadcasting.

(Chapt. 191, §2, Wash. Laws of 1933). The allegations of the complaint indicated that the station broadcasted within the "Fifth Zone" comprising eleven western and northwestern states, including Washington and the Territories of Alaska and Hawaii, it being licensed as a clear channel station, a station to which the opinion says:

> " * * * the Commission has assigned a radio frequency to be used at such times and with such power as will enable it to broadcast throughout the United States without interference by other stations." (p. 652)

The Court held that, as the income was derived from interstate commerce and there was nothing in the complaint to show that an attempt was made to segregate the receipts received from local broadcasts, the tax was invalid. The gist of the opinion is in the following paragraph:

> "As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of the type which has long been held to be an unconstitutional burden on interstate commerce, * * * It is enough that the present is not such a tax, but is levied on gross income derived from appellant's entire operations, which include interstate commerce. As it does not appear that any of the taxed income is allocable to intrastate commerce, the tax as a whole must fail, Cooney v. Mountain States Tel. & Tel. Co., supra; cf. Pacific Tel. & Tel. Co. v. Washington, supra, and the judgment of the state court must be reversed and the case remanded for further proceedings not inconsistent with this opinion." (p. 655-656)

It can be seen readily that the Hawaii tax is of a different character. The trial court found that the station operates within the Territory and the Supreme

Court of Hawaii, in sustaining the judgment of the trial court, made special reference to the findings and found that any income from short-wave relays was specifically excluded, saying:

> "The tax is upon the business of radio broadcasting 'within this Territory', measured by the gross income of such business. This excludes broadcasts between points in the territory and points outside the Territory. * * * The tax commissioner has assessed the tax accordingly by excluding therefrom receipts of KPOA from short-wave relays being broadcast between points in the Territory and points outside the Territory and by including and thus subjecting to the tax only receipts of the station from its 'standard wave' broadcasts, which latter are of commercial value only within and not outside the Territory." *McCaw v. Fase, supra,* at p. 715

We, therefore, have an authoritative finding by a territorial court approved by the highest court of the Territory which distinctly says that not only the statute itself, but also the practices under it, limit the tax to income from local activities only. Such interpretation must be followed by us. *Osborne v. Florida,* 1897, 164 U.S. 650, 654; *J. Bacon & Sons v. Martin,* 1939, 305 U.S. 380.

It is quite evident that a tax capable of such application is not a burden on commerce. And any general statement in *Fisher's Blend Station, Inc. v. State Tax Commission,* 1936, 297 U.S. 650 as to the nature of radio communication must be restricted to the context of the statute there under consideration and the pleadings under which the case was decided. Granted that the Congress has preempted the radio field, *National Broadcasting Co. v. United States,* 1943, 319 U.S. 190, and that the Communications Act requires federal licensing,

even for stations which operate from one place in any territory to another place in the territory (47 U.S.C. §301), these facts do not make the individual stations agencies of the Government immune from state taxation. *Broad River Power Co. v. Query,* 1933, 288 U.S. 178; *Buckstaff Bathhouse Co. v. McKinley,* 1939, 308 U.S. 358. And the character of radio communication does not prohibit a tax upon the state business any more than the interstate character of railroads, power companies, telephone, telegraph and express companies stands in the way of valid tax statutes of the type under discussion. For such a tax "does not aim to control interstate commerce." *Freeman v. Hewitt,* 1946, 329 U.S. 249, 254.

In *Whitmore v. Bureau of Revenue,* 1946, D.C.N. Mex., 64 F.Supp. 911, affirmed in *Whitmore v. Ormsbee,* 329 U.S. 668, a three-judge court, in dismissing an action involving the New Mexico business privilege tax which levied a tax in an amount equal to two per cent of the gross receipts upon the business of radio broadcasting (§§76-1404 N.Mex. Stats. 1941) stated that broadcasting was both intra and interstate in these words:

> "Plaintiffs are engaged in radio broadcasting; and, while their stations are located in New Mexico, the electro-magnetic waves transmitted from their respective stations cross state lines and their programs are heard by listeners both in New Mexico and in other states. Therefore, the business in which they are engaged is essentially in part intrastate commerce and in part interstate commerce. Fisher's Blend Station v. Tax Commission of State of Washington, 297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956." (p. 916)

The teaching of these cases is also that measures which partake of regulation are in a different category

from purely taxing measures which have none of the indicia of regulation. A taxing statute may, of course, be an attempt to control the commerce field in which the primacy is that of the federal government. But a tax such as the tax under consideration has no regulatory feature. Its only effect could be the increase of the cost of doing business which has never affected the validity of state taxing statutes. In sum, the arguments advanced by the appellants are adequately answered in one of the latest decisions of the Supreme Court, *City of Chicago v. Willett Co.*, 1953, 344 U.S. 574, in which the court found valid a license tax on trucks operated within the city. It is to be noted that in the main opinion Mr. Justice Frankfurter, who wrote the opinion in the case just cited, interpreted the meaning of the Pacific Telephone and Telegraph case in accordance with the views of the Supreme Court of Hawaii, with which we express agreement:

> "Thus, as regards the main point pressed by respondent, the Chicago tax avoids the infirmity laid bare by the Sprout case, and meets the facts of Osborne v. Florida, supra, and Pullman Co. v. Adams, supra, as did the Pacific Telephone case. Again, as in Pacific Telephone, the taxpayer here makes no showing that the tax, though directed at intrastate business only, in fact burdens interstate commerce. This is for the taxpayer to show affirmatively and respondent has made no attempt to do so.
>
> "But, if it were necessary to decide upon the basis of the 'nice distinctions' urged upon us, we could not rest without more on the authority of Pacific Telephone. For the tax in that case was measured by a percentage of the gross income drawn solely from intrastate business. Although the taxpayer's intrastate and interstate activities were in-

> separable, the tax was not laid inseparably on both. 297 U.S. at 414. That is not true in this case. Here the tax falls inseparably on what have been called instrumentalities of interstate commerce, which are at once also those of intrastate commerce. Whatever intrinsic signficance this difference may have in other situations, it becomes irrelevant in a case controlled, as is this one, by the governing principles of New York Central R. Co. v. Miller, supra." (p. 578)

In the foregoing we have sought to show that federal precedents sustain the view of the Hawaii courts. We did not refer to several decisions in which state courts have sustained taxes on local radio broadcasting where the local business was clearly separable from the interstate business. However, there are such decisions.

Dorsky v. Brown, 1951, 255 Ala. 238, 51 S(2) 360, certiorari denied 342 U.S. 818, in which a state tax on a coin operated radio was held not to violate the commerce clause.

City of Atlanta v. Oglethorpe University, 1934, 178 Ga. 379, 173 S.E. 110, in which a municipal license tax was applied to a college broadcasting station.

WDOD Broadcasting Corp. v. Stokes, 1941, 180 Tenn. 677, 177 S.W.(2) 837, in which a statute of Tennessee levying a tax on gross receipts was applied to a domestic broadcasting company.

Beard v. Vinsonhaler, 1949, 215 Ark. 389, 221 S.W. (2) 3, appeal dismissed, 338 U.S. 896, in which a license tax on the business of radio broadcasting and on persons soliciting advertising for radio was sustained. Interpreting the statute as a valid exercise of the taxing power, the Arkansas court said:

> "/* * * A substantial part of the appellees' programs originate locally and are of purely local interest. To that extent the appellees are engaged in a local enterprise readily separable from their interstate activity. Should they confine their broadcasts to programs brought in from other states there might be force to their suggestion that interstate commerce is being taxed. But as long as they conduct an essentially intrastate business as well, we see no reason why they should not bear their share of the cost of municipal advantages admittedly received. It is shown that daily newspapers pay an annual tax of $1000, although some of their papers go beyond the State boundaries. The telephone company's tax is $45,000, though its business is interstate as well as intrastate. By comparison the appellees' tax is moderate in amount. It is not even suggested that the sum exceeds the profits derived from local business, so that interstate receipts are to some extent affected." (page 4-5)

A direct appeal was sought to the Supreme Court from this case. This was denied in a *per curiam* decision which bore this very significant legend:

> "The appeal is dismissed for want of a substantial federal question. *Crutcher v. Kentucky,* 141 U.S. 47."

The Judicial Code allows a direct appeal to the Supreme Court "where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of its validity." (28 U.S.C.§ 1257(2))

So the court was bound to entertain the appeal if it felt that the statute violated any constitutional provision. As the court could see no question of violation of the commerce clause in the Arkansas statute, the ap-

peal was dismissed. See, *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 1952, 342 U.S. 35.[1]

It is clear from what precedes that the tax levied by the Legislature of the Territory of Hawaii is a valid and constitutional tax as applied to the local broadcasting business of the appellants and that the Supreme Court of the Territory of Hawaii was correct in sustaining the judgment of the trial territorial court which so held.

The judgment of the Supreme Court of the Territory of Hawaii is therefore affirmed.

(Endorsed:) Opinion. Filed Oct. 30, 1954.

Paul P. O'Brien, Clerk.

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[1]The Kentucky case referred to in the memorandum (*Crutcher v. Kentucky*, 1891, 141 U.S. 47) involved a tax imposed by the legislature upon the agencies of foreign express companies. The statute, in addition to providing for the payment of a license fee, required a showing on the part of the agent of the express company that the company was possessed of an actual capital of at least $150,000.00. The Supreme Court's reference to this case directs attention to a statute which, under the guise of tax, seeks to make what Mr. Justice Frankfurter in *Freeman v. Hewitt*, 1946, 329 U.S. 249, called "a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade." (p. 254) The tax under challenge in the case before us is not of that character.

No. 481

ADDENDA TO PETITION FOR CERTIORARI

Supreme Court of the United States

OCTOBER TERM, 1954

J. ELROY MCCAW and JOHN D. KEATING, *Petitioners*,
vs.
EARL W. FASE, the Tax Commissioner of the Territory of Hawaii, *Respondent*.
No. 481

ADDENDA TO APPENDIX B

INDEX OF ADDENDA

1. Judgment of United States Court of Appeals, Ninth Circuit 27A
2. Oral Decision of the Circuit Court for the First Judicial Circuit, Territory of Hawaii..... 29A
3. Decision of the Circuit Court for the First Judicial Circuit, Territory of Hawaii, as written by Rhoda V. Lewis, Esq., Deputy Attorney General, Territory of Hawaii (portions added or modifying Court's Decision are underscored).... 41A

No. 481

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. ELROY MCCAW and JOHN D. KEATING, *Appellants*, vs. EARL W. FASE, The Tax Commissioner of the Territory of Hawaii, *Appellee*.	No. 13,920

APPEAL from the Supreme Court for the Territory of Hawaii.

THIS CAUSE came on to be heard on the Transcript of of the Record from the Supreme Court for the Territory of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said Supreme Court in this Cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and entered: October 30, 1954,
PAUL P. O'BRIEN, Clerk.

ORAL DECISION OF THE CIRCUIT COURT FOR THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII

Law No. 21340

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII
AT TERM IN LAW

J. ELROY MCCAW and JOHN D. KEATING, *Complainants,*

v.

THE TAX COMMISSIONER OF THE TERRITORY OF HAWAII, TORKEL WESTLY, *Defendant.*

No. 21340

ACTION TO RECOVER EXCISE TAXES PAID UNDER PROTEST

DECISION

(The Clerk called the case at 11:00 a.m.)

THE CLERK: For decision.

THE COURT: Gentlemen, this is an action by the complainants, McCaw and Keating, to recover gross income taxes levied against their receipts or a portion of their receipts from broadcasting, receipts which were paid under protest, together with some interest and penalties.

The Territory, in responding to the action, has in addition to denying the allegations of the complaint have cross-complained for the amount which was alleged to be due in addition to the amount herein sued for.

The complainants operate a broadcasting station here in the City of Honolulu, commonly known as Station

KPOA, on a wave band of 630 kilocycles with 5,000 watts of power. The business in which they are engaged is one which is controlled and regulated in a very great degree by the Federal Communications Commission. It is the contention of the complainants that because of the preemption of this field of endeavor by the Federal Communications Commission that any state or territory, and of course in this case, the Territory of Hawaii, has not the right or the power to impose this tax as the regulation of such a business has been preempted and therefore that they are precluded.

Now, the Federal Communications Commission has defined what is an interstate communication. That is Section 3 of the Communications Act of 1934, it being subsection (e), which says, "An interstate communication or transmission means a communication or transmission from any state or territory," and then, leaving out the various things that are not important, "to any other state or territory." And, of course, there has to be a license for any radio station, as provided by Section 301 of the Act, where there is any apparatus operated for the transmission of energy or communication by signals, by radio, from one place in any territory to another place in the same territory or within states or between a state and a foreign country, and things of that kind. So, that particular section just quoted really means that it takes in all forms of radio communication, no matter what they are, whether they be transmission between states or between a station and points right here in Honolulu, or between taxicabs or any sort of a communication of that kind. The only

thing that I understand is excluded from the Act is the governmental transmission.

It has been held in a number of cases upon which the complainants assert their position that radio broadcasting by the very nature of that industry, or whatever we may term it, is in the field of interstate commerce for the reason that once the radio impulse or waves, or whatever you want to call them, are put in motion by broadcasting apparatus that there is no longer any control over the transmission of that signal. And, of course, on the mainland, where state boundaries are very close, it is impossible to say in many instances that it (radio) is not interstate commerce. Examples have been referred to, such as a radio station in Spokane or Coeur d'Alene, a radio station in El Paso, near the Mexican border, a radio station at Yuma, between California and the Arizona border, and you could make any number of such examples.

It is further contended by the complainants that this tax is a burden upon interstate commerce, in which this radio is engaged, and therefore an undue interference with interstate commerce, and therefore that the tax is void.

It is contended, on the other hand, by the Territory that KPOA, when we start to analyze its business and the field in which or the area in which it is involved, that we can go to the licensing and the regulations of the Federal Communications Commission and to a great extent find our answer.

Now, KPOA, it has been testified, is without question a station of the 3-A class of radio stations. Such a

station is one which operates with power or not less than one kilowatt nor more than five kilowatts and the service area of which is subject to interference in accordance with the engineering standards of allocation. And then, Section 3.30 of the Communications Act provides that such station, "Each standard broadcasting station will be licensed to serve primarily a particular city, town, or other political subdivision, which will be specified in the station's license, and the station will be considered as located in that place." And subsection (c) of that, "The transmitter of each standard broadcast station shall be so located that the primary service is delivered to the borough or city in which the main studio is located, in accordance with the standards of good engineering practice."

There must be in ordinary broadcasting three service areas. They have been defined by the Federal Communications Commission as follows: "The term 'primary service area of a broadcasting station' means the area in which the ground wave is not subject to objectionable interference or objectionable fading." Under that particular classification it has been testified in this case that during the daytime hours KPOA does its broadcasting by the means of the ground wave and that this ground wave reaches the entire group of the Hawaiian Islands, with two exceptions. However, we may say two major exceptions. One is an area on the northern part of Kauai, just back of the mountains that we know as Kokee, or the Canyon; the other is that area south of the high mountains on the Island of Hawaii and includes the city of Hilo. And it might be well to note at this particular place that this station, as well as

another broadcasting station located here in Honolulu, each has a subsidiary or connected station located in the city of Hilo. The secondary area of a broadcasting station means the area served by the sky wave and not subject to objectionable interference. The signal is subject to intermittent variations in intensity.

It has been testified in this case that at night the signals by the radio broadcasting are sent out to a great extent through a sky wave or sky waves and at night these sky waves, as the Court understands them, goes up a ways and hits something, bounces back and hits the earth or water and then back again, and these going back and forth reach out and under certain phenomena can be heard in almost any place on earth.

But the question for this Court to decide in that particular category is, what is the area in which the sky waves are of such intensity and are capable of being, we may say, pleasurably heard by a listening audience —we may put it this way—to be of commercial value to a radio station that is in business with the exception of 30% of its time which may be allotted to programs from which he can, if he can find sponsors, get remuneration for the operation of that station.

There is a third area of service and it is defined as the area, the intermittent service area of a broadcasting station, means the area serviced from the ground wave but beyond the primary service area, subject to some interference or fading.

There have been a lot of technical terms used here. I hope I don't make a mistake in the use of them, but this Court, hearing this case, of course this Court has

the first chance of making the mistake, if I do make the mistake. I don't feel that I am too much to be blamed because this is something I never heard of before in my life. It seems to me, as I understand the ground wave, that there is .5, approximately .5 of a microvolt per meter is the area, or something of that kind, wherein there is supposed to be proper listening, and you go on from there out until you get less and less. I think I had that ' wn here some place, but the attorneys know what I mean anyway; they understand what I am talking about.

In this case there have been letters, what they call D-X letters that have been received. These letters fall in the category, as I understand it, of people that have a hobby to a great extent of listening to stations and picking up signals, and a lot of them have a regular form letter that they send in, and one of the things they seem to be interested in is to get an acknowledgment to put in their albums or collection, or whatever it is. So that these D-Xer letters have come from a great many places. I believe, if my memory serves me correctly, there was one received from some place in Massachusetts, there was one received from some place in Australia, a number from New Zealand, Samoa, and various places in the Pacific, and of course a number of other places on the mainland. It is my recollection also that this reception or hearing of this station were all received via the route of the sky wave as contradistinguished from the ground wave. There is an exception of one instance, in which there was some testimony that on the battleship Iowa, I think it was, that somebody heard a ground wave on one of the radio re-

ceiving stations on board that vessel, some 1,500 miles out to sea. One of the engineers, the engineer for the Territory, said it was possible but it was an exception, that generally speaking the volume of the ground wave at that distance in the daytime was, as I understood what they were endeavoring to state, that when the ground wave gets down so it is weak enough, then it is drowned out and it doesn't become listenable because of ground noises.

So that this Court, after listening to this evidence, and in its ordinary, simple terms, I am not endeavoring to get into the field or to use the language of the gentlemen who have been on the stand because I would just get myself tied up in knots, I believe that the evidence here shows that the ground waves certainly, or the daytime broadcast is incapable, so far as any commercial value for constant listening, is confined to the Hawaiian Islands; that the sky wave at night for commercial purposes, I believe, is also limited to the Hawaiian Islands. That is, for dependability.

Now, it seems that in radio that the hours of the day, the seasons of the year, vary, the ability to receive these broadcast signals so that at certain seasons of the year signals can be very plainly heard in Alaska, certain seasons of the year they can be heard south, and if the channel through which they travel is in darkness, then that aids in its reception.

There has been introduced into evidence a great many articles from magazines, advertising radio coverage, also brochures, so-called, that this station and other stations here in the Territory have put out, I under-

stand for the purpose of advising their prospective sponsors or persons buying radio time, that the map or chart, to a great extent, exhibited or attached to such an article, is the coverage or the area that the radio selling the time is covered. In each of those instances here in Hawaii, they have not gone beyond the Territorial limits of the Territory of Hawaii, that is, for local broadcasting. I am talking about the ordinary broadcaster's band and not the short-wave band.

There has been testimony that in one instance a gentleman from Samoa, who I understand is now in Durance Vile, purchased some time to broadcast a program to Samoa, and it was broadcast, as I recall the testimony, at an hour in the wintertime, in December, as I recall, when the sky wave would be used at night to deliver the program to Samoa.

There is evidence in this case that a request has been made of these complainants to produce any sponsor who has purchased commercial time on their broadcasts with an end in view of sending advertising to any radio audience other than that located within the Territory of Hawaii; that there has been no showing of any such thing, with the exception of this one Samoan program, if you can call that one.

Now, we come down to reality—what does this broadcast company make its money out of? With the exception of short-wave relays such as baseball games, fights, football games, various programs such as Hawaii Calls, and that sort of thing, which is either sent or received by short-wave to or from the mainland, as the case may be, their broadcasting, in the Court's mind, is confined to the Territory of Hawaii and they make their money

with Hawaiian audiences in view and not the audience outside the Territory.

Let's go into these various cases, or let's say these various lines of cases that have been ably argued before the Court. We take first the stevedoring cases. There have been attempts in various courts of the United States to tax stevedoring companies on the receipts that they have made from loading and unloading steamships. It has been apparently uniformly held that that is an interference with interstate commerce, the reasoning being that when you put cargo on a vessel it is going either to a foreign port or to another state, and they have held that the interstate transportation of that cargo starts when the sling or when you put the cargo in the sling to put it on the ship and it is not completed until it is taken off the sling and put on the dock at its destination.

Now, another line of cases is the railroad cases. We have a great many trans-continental railroads and many of them that involve a number of states. It seems to be the universal holding that a railroad system is so intricate in its nature that you cannot tax it because you cannot segregate the services, so that it is more or less custom, and of course, we have our steamship fares, our airplane fares, and things of that kind, which are within interstate commerce.

There has also been brought to the attention of this Court a number of cases, what they commonly call trucking cases, and where it has been shown that the trucking was solely of an interstate nature, then the states have been prohibited from interfering with that

or with taxing its proceeds. However, it has been held in one case of a belt-line railroad, where it picks up freight cars from freight yards of various railroads and takes them to the docks in a city, that is where it is wholly within the city area, and that is the only business of the belt railroad, that that is intra-state commerce and subject to taxation.

If this station were so situated that the reception of its programs in another state or territory was sufficiently constant so as to be of commercial value, this Court would without hesitation find that this was an interstate enterprise.

There have been a number of cases which Mr. Davis, able counsel for the stations, has brought to the Court's attention, particularly in the State of Washington, the leading case being what has been referred to here as the *Fisher's Blend* case. That case went to the Supreme Court of the United states and Mr. Justice Stone, I believe, made a finding that the radio field was interstate in its nature. But in that particular case the facts which were furnished the court, there was a stipulated set of facts that went to the Supreme Court, upon which we must consider is the basis of their decision, and it was that this station was engaged in broadcasting on a clear channel, not only interstate but international, and that it received money for that sort of broadcasting. So that, under the stipulated facts the Court could make no other finding. Then there are other Washington cases of a similar nature that have found to the same effect.

There is a case that has been referred to as the *Albu-*

querque case, where the station was located in Albuquerque and a tax of this kind was sustained down there on the basis that that station only served a particular area and that particular area was within the state, and they excepted, if my memory serves me right, any programs over that station that were broadcast through a media coming from outside the state, or in that particular case, where they have a chain of broadcasting stations, the station was sending a program from that station to other stations.

Now, here, I believe that our situation is different than it is upon the mainland. It is 2,500 land miles approximately from here to the Pacific Coast. I do not believe, with a station of this kind, that it could or has engaged, with reference to its ordinary broadcasting band, and I am not talking about short-wave relay, in interstate commerce in that regard.

The complainants have not shown to this Court that this gross income tax of 2%, which everybody in the Territory pays, not only the radio stations but everybody else, is such a burden upon this station that would interfere with its operation. It does not lie in the same category as the Colorado Railroad case, wherein the short-line railroad or the railroad made a contract with the state to operate a short line within the state, and the Federal people said that that contract was no good because it would be a drain and a hindrance to the operation of the main railroad in interstate commerce.

Now, gentlemen, in general that is what the Court has found. Of course, there are these foreign programs, these foreign language programs, operating and they sold time on those.

The Court has gone over the proposed findings of fact that have been submitted here by Miss Lewis. I think I have covered them considerably, but in order that there can be no mistake, I think that those proposed findings of fact meet with the Court's approval, and if the Court has overlooked any of them in its oral decision they may be incorporated in the final decision as part of the Court's findings.

And the Court finds, in essence then, in favor of the Territory and against the complainants for the reasons here stated.

The prevailing party will submit a form of decision in conformity with the findings of the Court herein announced and may incorporate the oral decision of the Court by reference as it is reflected in the reporter's notes taken at this time.

The Court at this time wishes to thank both sides in this case for an able presentation of the case. I do not purport to be omnipotent. All I can say is, that another gentleman has said, a gentleman from the State of Washington, the Honorable Jeremiah Neterer, that I happen to be the judge to have the first opportunity to make a mistake.

All right, gentlemen. You may have your exception.

MR. INGMAN: We except to your Honor's ruling on the ground it is contrary to the law and the evidence and give notice of a motion for new trial and notice of an appeal.

And there is one exhibit here, your Honor, that we now have and we would like to substitute.

DECISION OF THE CIRCUIT COURT FOR THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII

As written by Rhoda V. Lewis, Esq., Deputy Attorney General, Territory of Hawaii

[Underscored portion is that which was added, or modifying Court's Opinion, by appellee's counsel]

Law No. 21340

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII
AT TERM IN LAW

J. ELROY MCCAW and JOHN D. KEATING,
Complainants,
v.
THE TAX COMMISSIONER OF THE TERRITORY OF HAWAII, TORKEL WESTLY,
Defendant.
No. 21340

ACTION TO RECOVER EXCISE TAXES PAID UNDER PROTEST
Filed in open court at 2:15 o'clock p.m., Jan. 28, 1952
R. A. Lynn, Clerk.

RHODA V. LEWIS, ESQ.
Deputy Attorney General
Territory of Hawaii
Attorney for the Tax Commissioner

DECISION [*Written by Appellee*]

This is an action by the complainants, J. Elroy McCaw and John D. Keating, to recover gross income taxes paid under protest, together with some interest and penalties. The tax law involved is chapter 101 of the Revised Laws of Hawaii 1945, as amended.

Complainants are a co-partnership, registered as such under the laws of the Territory of Hawaii, and they hold under said chapter 101 a license to engage in

business; this license has been renewed annually to and including the year 1951. (Pursuant to section 5451.01, as amended, renewal for 1952 may be on or before January 31, 1952).

The tax assessments concerned in this case involve the period to and including July 31, 1950. Complainants paid under protest part of the taxes demanded by the Tax Commissioner for this period. The Tax Commissioner, defendant herein, in addition to denying the allegations of the complaint, cross-complained for the balance of the taxes assessed by him for this period, together with penalties and interest. An oral motion to dismiss this counterclaim was made on January 14, 1952, and was denied on the ground that section 10476 of the Revised Laws of Hawaii 1945 is applicable.

The taxes involved in this case were levied against broadcast receipts of the aforesaid period. During this period complainants operated, and now operate, a radio broadcast station on a frequency of 630 kilocycles with 5000 watts of power. This station operates under the call letters KPOA, and commonly is so known. Complainants also operate, in connection with KPOA, a station in Hilo, but the Hilo station commenced operations subsequent to the period involved in the aforesaid assessments.

The business in which complainants are engaged is one which is controlled and regulated in a very great degree by the Federal Communications Commission under the Communications Act of 1934, Title 47, chapter 5, United States Code. It is the contention of the complainants that this field of endeavor has been preempted by the federal government to the exclusion of

any state or territorial tax. It further is contended by the complainants that this radio station is engaged in interstate commerce, and that the territorial tax is a burden upon interstate commerce and an undue interference therewith, and therefore void.

The Tax Commissioner, on behalf of the Territory, asserts that the federal statute and regulations embrace more than interstate communication (and from sections 3(e) and 301 of the Communications Act of 1934, 47 U.S.C. 153(e) and 301, this appears to be so); that the breadth of the field of regulation under the Communications Act of 1934 does not indicate that the states and the territories are excluded from all taxes in this wide field; that the pertinent question here is the extent to which KPOA is engaged in interstate communication and whether the taxed receipts are derived from interstate communication; that the facts show that the sole source of the taxed receipts is the transmission of KPOA broadcasts to the radio audience in the Territory, hence those receipts are from solely intrastate communication and may be taxed, and that no illegal burden on interstate commerce results from such a tax. The Tax Commissioner asserts the fact to be that KPOA's standard band broadcasts do not reach any radio audience outside the Territory with effective or satisfactory service that is of commercial significance, that only the receipts from short-wave relays are from interstate communication and those have not been taxed.

After trial of the case commencing January 3 to and including January 11, 1952, study of the memoranda which the parties submitted at the inception of the

trial and authorities cited, and oral argument on January 14, 1952, the Court on January 15, 1952, rendered its oral decision upholding the contentions of the Tax Commissioner; said oral decision, as reflected in the official reporter's notes, is incorporated herein by reference.

It has been held in a number of cases, upon which the complainants rely, that radio broadcasting, by its very nature, is interstate commerce for the reason that once the radio impulses or waves are put in motion there is no control over the extent of their transmission. But the pertinent question is: What is the area in which the KPOA broadcasts have commercial value? Save for 30% of its time which, under F.C.C. requirements, must be used for sustaining programs, the station may and does seek remuneration from sponsors of commercial programs and the like. So what we come down to is: What does this broadcast company make its money out of? The Court has concluded that, with the exception of the short-wave relays, KPOA makes its money with the Hawaiian audience in view and not the audience outside the Territory. As a result the receipts from these broadcasts may be taxed.

The receipts from railroads have been held taxable where obtained from the transportation of freight picked up at a point within the state and delivered to another point in the same state. In the case of a transcontinental railroad system the transcontinental hauls are tax exempt, but not the local business, although a railroad system is intricate in its nature. (See *Pacific Telephone and Telegraph Co. v. Tax Commissioner*, 297 U.S. 403). So with the trucking business, it is where

the trucking is solely of an interstate nature that the states have been prohibited from taxing the proceeds. As to stevedoring, it has been held that when the cargo is put in the sling to put it on the ship that is the start of the interstate transportation and for that reason to tax the stevedoring receipts is an interference with interstate commerce.

Here as already stated the tax is on intrastate communication, and the complainants have not shown to this Court that this 2½% gross income tax, which everybody in the Territory pays, not only the radio stations but everybody else, is such a burden upon this station as to interfere with its operation. What complainants would have had to show can be ascertained by considering the Colorado Railroad case (271 U.S. 153), which was explained and held inapplicable in certain tax cases that were decided in *Pacific Telephone and Telegraph Co. v. Tax Commissioner, supra*, 297 U.S. 403.

The leading case as to radio broadcasting is the *Fisher's Blend* case (297 U.S. 650). In that particular case there was a stipulated set of facts that went to the Supreme Court, and which we must consider to be the basis of the decision. Under those facts the broadcasting there was not only interstate but international and the station received money for that sort of broadcasting. A radio station in Spokane, Washington, or Coeur d'Alene, Idaho, or El Paso, near the Mexican border, or Yuma, Arizona, near the California border, might be interstate. However, a station in Albuquerque, New Mexico, was held (51 N.M. 332 and 54 N.M. 133, 184 P. (2d) 416 and 215 P.(2d) 819) to have some broadcasts

that were directed only to a particular area within the state, though certain chain broadcasts and certain broadcasts of out-of-state media were held non-taxable.

If this station were so situated that the reception of its programs in another state or territory was sufficiently constant so as to be of commercial value, this Court without hesitation would find that this was an interstate enterprise. But it is situated in Honolulu, 2,500 land miles from the pacific coast. It is, under the regulations of the Federal Communications Commission (47 C.F.R. Chapter 1, Part 3) a Class III-A station, as set forth in Sec. 3.22 of the cited regulations (Exhibit 1). Attention also is called to section 3.30, paragraph (a), as to the place which a standard broadcast station is licensed to serve primarily, and paragraph (c) of the same section as to the location of the transmitter for the delivery of primary service to the place where the main studio is located. By the above cited regulations and the "Standards of Good Engineering Practice Concerning Standard Broadcast Stations" (Exhibits 1 and 2) the Federal Communications Commission has defined three service areas and has set standards for the determination of these service areas.

During the daytime hours KPOA does its broadcasting by means of the groundwave. The area in which the groundwave is not subject to objectionable interference or objectionable fading is, under the F.C.C. regulations and standards, above cited, the primary service area. A groundwave signal of half a millivolt per meter (.5 mv/m) generally will afford proper listening. KPOA has a groundwave signal of .5 mv/m or better throughout the Hawaiian Islands, as shown on Exhibits 5a and

37, but with two major exceptions there shown. These exceptions are the northern part of Kauai, just back of the mountains that we know as Kokee, and the area (including the city of Hilo) south of the high mountains on the island of Hawaii. It is noteworthy that the evidence shows that KPOA has a connected station located in Hilo, and also shows another such instance in connection with another Hawaiian station.

Beyond the half-millivolt groundwave contour the possibilities of service by the groundwave depend on certain factors set forth in the F.C.C. standards, and as the signal grows less and less the question is whether the groundwave is rendering "intermittent service," the "intermittent service area" being defined by the F.C.C. as "the area receiving service from the groundwave but beyond the primary service area and subject to some interference and fading." Intermittent service depends upon a number of factors, but it is clear that when the groundwave signal is so weak it is drowned out by the noise level, that cannot be listenable. Upon all of the evidence (including the evidence as to reception on the battleship Iowa under the particular circumstances explained by the engineer called by the Territory) the Court has concluded that finding number 5, below set forth, is correct.

During hours of darkness a radio station can broadcast by the skywave. Under certain phenomena the skywave signal can be heard almost any place on earth. The area served by the skywave and not subject to objectionable interference is, by the F.C.C., called the "secondary service area." Standards for "secondary service" are set forth by the F.C.C. in the "Standards

of Good Engineering Practice" (Exhibit 2). It is not suggested that reception outside the Territory of the skywave signal of this Class III-A station meets those standards.

The evidence shows that reception of the skywave is not dependable, due to a number of factors. Letters received in evidence from persons reporting listening in distant places (commonly called "D-X" letters) have been considered. These were instances of reception outside the Territory by the skywave, but such reception outside the Territory is not sufficiently dependable for commercial purposes.

There have been introduced in evidence and the Court has considered advertisements of radio station coverage of stations in the continental United States and the Territory, including a brochure put out by this station. In no instance in the Territory has the advertised coverage gone beyond the territorial limits of the Territory of Hawaii.

There is evidence of a request made by the Tax Commissioner of the complainants to produce any sponsor who has purchased commercial time on KPOA with an end in view of sending advertising to any radio audience other than that located within the Territory of Hawaii. There has been no showing of any such purchase. A possible exception is the sale of radio time to Willie Saaga for a Samoan program (Exhibit L). The circumstances of this sale appear from the evidence. When the Tax Commissioner was preparing the assessments no showing of this sale was made to him although KPOA was given an opportunity to make such showing;

finding and conclusion number 10, below set forth, dispose of this matter.

There have been submitted by the Tax Commissioner proposed findings and conclusions, which include some of the matters above set forth and some additional matters. The Court finds and holds these to be in accordance with the law and the evidence; they are as follows:

1. In so far as places outside the Territory of Hawaii are concerned, KPOA's broadcasts on its standard band do not afford effective or satisfactory service that measures up to the standards for commercial coverage.

2. Time buyers do not buy time on KPOA as a medium of communication to an out-of-the-Territory audience.

3. Where a KPOA broadcast is directed to an out-of-the-territory audience a shortwave relay is used, as in the case of the program "Hawaii Calls."

4. The tax has not been assessed on any receipts from broadcasts carried out of the Territory by shortwave relay or brought into the Territory by shortwave relay.

5. During daylight hours enjoyable listening to the KPOA standard band broadcasts is impossible at places outside the Territory, and is limited to ships or planes that happen to be within range.

6. During hours of darkness reception of KPOA's standard band broadcasts outside the Territory is too unreliable and irregular for such reception to have commercial value.

7. KPOA has a "foreign language department"

which is offered by it as a service to advertisers. This department conducts, each broadcast day, a substantial number of hours of broadcasts in Japanese and in a Filipino dialect. These broadcasts are scheduled by the station each day on a participating basis, that is, the station puts on the foreign language programs and sponsors buy spot announcements on the programs.

8. A large number of KPOA time buyers have no desire or occasion to reach any audience outside the Territory, even if effective and satisfactory service were offered.

9. The radio audience outside the Territory of Hawaii is not a factory in the selling or buying of radio time on station KPOA, where no shortwave relay is employed.

10. The sale of radio time to Willie Saaga, shown by plaintiffs' Exhibit L, is an exceptional instance, and the Tax Commissioner was not obliged to take notice of this exceptional instance unless it was called to his attention. Before the tax assessments were made KPOA was given an opportunity to make such showing but did not do so and is not now entitled to a deduction for this sale.

11. The Territorial tax law has been and is properly interpreted and applied by the Tax Commissioner and the tax law and assessments made thereunder are valid.

12. The plaintiffs are not entitled to recover the taxes paid under protest and the Tax Commissioner is entitled to judgment on his counterclaim.

In accordance with the foregoing the Court finds that the sum of $7,637.33 paid under protest by the com-

plainants to the Tax Commissioner is a lawful government realization and that the complainants are not entitled to recover the same, and in addition thereto the Tax Commissioner, on behalf of the Territory, is entitled to recover of the complainants the further sum of $14,595.98 together with additional interest accrued from the first day of April, 1951, to and including the 31st day of January, 1952, in the amount of $96.98 for each month, or fraction thereof, and the costs herein incurred. A judgment in accordance herewith will be signed on presentation.

DATED at Honolulu, T. H., this 28th day of January, 1952.

WILLSON C. MOORE
Judge of the Above Entitled Court.

J. ELROY MCCAW and JOHN D. KEATING, Complainants herein, do hereby except to the foregoing Decision.

J. ELROY MCCAW and JOHN D. KEATING, *Complainants,*
By DAVID N. INGMAN, KENNETH DAVIS, JUSTIN MILLER and VINCENT T. WASILEWSKI, *Their Attorneys,*
By DAVID N. INGMAN

EXCEPTION ALLOWED this 28th day of January, 1952.

*S/*WILLSON C. MOORE (Seal)
Judge of the Above Entitled Court.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office, in full force and effect this 17th day of April, 1952. AMY E. NUTTALL, *Clerk, Circuit Court, First Circuit, Territory of Hawaii.*